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No. 961755

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA

Respondent,

BLUFFORD HAYES, JR.,

Real Party in Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does a ruling by the Ninth Circuit Court of Appeal rejecting the express holding of the California Supreme Court regarding that court's consistent and routine application of its timeliness procedural bar offend the basic principles of federalism and comity underlying the procedural default rule?

2. Do the principles of comity and federalism prohibit the Ninth Circuit from placing a burden of proof on the state to prove that its timeliness requirements for capital habeas cases have been regularly and consistently applied before the federal courts will limit federal collateral review of claims which were not timely presented to the state courts?

3. May the Ninth Circuit refuse to honor a forty-year-old state procedural bar which precludes habeas corpus from being used as a substitute for appeal where there has been no showing that the state failed to consistently and regularly apply the default?

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Arthur Calderon, Warden of California State Prison at San Quentin, ("the warden") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case in which Bluford Hayes, Jr., is the Real Party in Interest (hereinafter Hayes).

OPINION OR JUDGMENT BELOW

The opinion of the United States Court of Appeal for the Ninth Circuit is reported as 96 F.3d ___ (9th Cir. 1996), denying petitioner's petition for a writ of mandamus. A copy of that decision is attached as Exhibit A to the Appendix to this petition for writ of certiorari. The order of the United States District Court for the Eastern District of California that denied petitioner's motion for summary dismissal is unreported and is reproduced and attached as Exhibit D to the Appendix.

STATEMENT OF JURISDICTION

The warden timely invokes the Court's jurisdiction pursuant to 28 U.S.C. section 1254(1). The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 20, 1996.

CONSTITUTIONS, STATUTES OR REGULATIONS

Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be

> the supreme law of the land; and the judges in every state shall be bound thereby; any thing in the Constitution or law of any state to the contrary notwithstanding.

The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 2254 of title 28, United States Code, provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On January 22, 1982, Real Party in Interest Blufford Hayes, Jr., was convicted in San Joaquin County of first degree murder, with the use of a firearm and in conjunction with the special circumstance that the murder of Vinod Patel occurred during commission of a burglary by Hayes within the meaning of California Penal Code section 190.2, subdivision (a). 17(g). The appeal to the California Supreme Court was automatic.

On October 29, 1987, Hayes, with the assistance of his appointed counsel, filed a petition for a writ of habeas corpus in the California Supreme Court which raised four issues. On May 18, 1989, the California Supreme Court vacated the order to show cause which had been issued in the habeas corpus proceeding as

improvidently issued and denied the petition on the merits.

On December 31, 1990, the California Supreme Court unanimously affirmed the conviction in Hayes' automatic appeal in *People v. Hayes*, 52 Cal.3d 577 (1990). This Court denied a petition for certiorari on November 12, 1991. *Hayes v. California*, ___ U.S. ___, 112 S.Ct. 420 (1991).

On April 14, 1992, Hayes sought appointment of counsel in the United States District Court for the Eastern District of California. Counsel, including the attorney who represented Hayes in the state appellate proceedings, were not formally appointed until October 27, 1992.

On June 22, 1993, Hayes filed a federal petition for writ of habeas corpus in the district court, which alleged 63 claims. *Hayes v. Vasquez*, No. CIV-S-592-0603 DFL/GGH.

On July 29, 1993, the California Supreme Court filed its opinion in the cases of *In re Clark*, 5 Cal.4th 750 (1993) and *In re Harris*, 5 Cal. 4th 813 (1993).

On February 4, 1994, the federal proceeding was stayed pending Hayes' exhaustion of 44 claims in state court.

On April 22, 1994, Hayes filed his second state petition for writ of habeas corpus which contained 44 claims. The California Supreme Court denied this second petition on June 21, 1995, pursuant to *In re Clark*, finding that 32 claims were untimely, and barring three other claims pursuant to *In re Dixon*, 41 Cal.2d 756 (1953). A copy of this order is included as Exhibit B in the Appendix.

On June 14, 1995, Hayes filed his amended petition for writ of habeas corpus in the district court which contained 65 claims, including the 35 procedurally barred claims.

On July 18, 1995, the state filed a motion to dismiss the 35 claims on the grounds that these claims

were procedurally barred for failure to comply with California's independent and adequate state procedural rules of default.

On January 22, 1996, the magistrate judge, pursuant to a referral by the district court under 28 U.S.C. section 636, subdivision (b)(1)(B), and Local General Order No. 262, filed Findings and Recommendations (hereinafter, "Findings"), wherein the magistrate judge denied the motion by the warden, to dismiss these 35 defaulted claims. A copy of these Findings is included as Exhibit C in the Appendix.

On April 10, 1996, the district court, over the State of California's objections, filed an order adopting the magistrate judge's Findings and denying the state's motion to dismiss. A copy of that order is included as Exhibit D in the Appendix.

A petition for a writ of mandamus was filed with the Ninth Circuit on September 6, 1996, and was denied without argument on December 20, 1996.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case involves a capitally convicted defendant's default of 35 constitutional claims that were first brought on state collateral attack in a second state habeas petition approximately 12 years after his judgment of conviction and more than four years after the California Supreme Court decided his direct appeal. The state court denied the claims on the grounds that they were untimely and should have been raised on appeal. Under the procedural default rule, Hayes should not be allowed to raise these claims in federal court. Yet, the Ninth Circuit has gutted California's default rules by summarily holding that they are not consistently applied.

This case presents the Court with a substantial question of national importance. It requires this Court to

resolve a conflict between the circuits which has arisen on the question of whether principles of comity and federalism prohibit the federal courts from placing the burden of proof on the state to prove that its timeliness requirements for capital habeas cases have been regularly and consistently applied before the federal courts will limit collateral review of claims which were not timely presented to the state courts.

Furthermore, this case presents the critical question of whether the Ninth Circuit may effectively strike down California's timeliness bar in capital habeas cases when there never has been a factual showing that California failed to regularly and consistently apply its timeliness requirements.

The third question raised by the Ninth Circuit's decision in this case is whether the federal courts may also refuse to honor California's forty-year-old procedural bar which prohibits defendant's from using habeas corpus as a substitute for their direct appeal (the so-called *Dixon* bar) where there has been no showing that the state failed to consistently and regularly apply this bar.

The Ninth Circuit's rejection of these two long established state procedural bars, timeliness and the *Dixon* bar, will have and already is having, devastating effects on California's attempt to expeditiously enforce capital punishment in this state. Striking down the timeliness bar will adversely effect over 80% of the death sentences which have been affirmed by the California Supreme Court. The Ninth Circuit's rejection of California's long-established timeliness requirements will geometrically expand the number of claims considered on their merits in the federal courts. In this case alone, it has doubled the number of claims to be decided by the federal court.

The fallout from this ruling is already wreaking havoc in California's capital cases. One federal magistrate judge has already refused to honor a state procedural bar finding and has recommended setting aside a 15-year-old

penalty trial for a claim which should never have been considered on the merits.

Another district court has filed an order indicating that 4 claims in a federal habeas corpus petition would be remanded back to the California Supreme Court for exhaustion but has also held that *if* the claims were found to be procedurally barred for untimeliness, such a state court finding have no effect when the defendant returns to federal court.

Comity and federalism demand that a ruling which has these devastating and unjust consequences not be allowed to stand. The State of California has a weighty interest in the finality of its judgments and in the prompt enforcement of its law. Both of these interests are served by the timeliness and *Dixon* bars which encourages defendants to raise and litigate all claims at the earliest opportunity. This case presents an important question of federal law affecting the most basic aspects of federalism, questions up to now unresolved by this Court, with especially far-reaching consequences in collateral attacks on state death penalty judgments.

ARGUMENT

I.

THE NINTH CIRCUIT'S REJECTION OF THE CALIFORNIA SUPREME COURT'S EXPRESS TIMELINESS PROCEDURAL BAR FINDINGS OFFENDS BASIC PRINCIPLES OF COMITY AND FEDERALISM

The question presented in this case is extremely important since the Ninth Circuit's rejection of the California Supreme Court's express application of its timeliness procedural bar to 32 of Hayes' claims is an affront to comity and federalism and because this ruling has already had profound and unjust consequences on the recognition of this state's procedural rules.

As a result of the Ninth Circuit's decision, California will be forced to litigate in federal court numerous successive and untimely claims, many of which contain a number of subissues, which were properly procedurally barred by the state court. In this case, and in other cases, the state will also be forced to litigate claims which were procedurally defaulted under state law since they could have been, but unjustifiably were not, raised on appeal. *Ibid.* An appeal after the final resolution of this case in the district court will not mitigate this irreparable damage. *See In re Cement Antitrust Litigation*, 686 F.2d 1297, 1302 (9th Cir. 1982). If the state eventually spends time and money defending these claims and prevails on the claims on the merits, an appeal of the district court's decision on the procedural bars issue will be moot. "'A party may not appeal from a judgment or decree in his favor for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree'" [citation omitted].

United States v. Good Samaritan Church, 29 F.3d 487, 488 (9th Cir. 1994). If the state does not prevail on the merits of the claims and relief is granted on a claim which should never have been before the district court, a challenge to the district court's decision on the merits will force the state to fully litigate all 32 untimely claims that should have been and in fact were expressly found to be procedurally barred.[1] In either event, the state's authority to mandate that state prisoners comply with its valid procedural requirements is unjustifiably compromised.[2] More importantly, this unnecessary litigation is contrary to the weighty state interest in the

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1. The Ninth Circuit's erroneous rejection of California's timeliness bar leads to the inevitable conclusion that California's procedural bars here at issue may be respected by the federal courts, if at all, only in those cases where the direct appeal has been affirmed and first state habeas petition has been filed after July 29, 1993, the date of publication of *In re Clark* and *In re Harris*. As of February 1, 1996, there were 171 capital cases that had been affirmed on appeal by the California Supreme Court. California Department of Corrections, *CDC Condemned Inmate List: (Sentences Affirmed by the California Supreme Court)*, (Feb. 1, 1996). Only 31 of these capital cases were affirmed by the supreme court after *Clark* and *Harris*. Thus, the Ninth Circuit's rejection of the timeliness bar will result in the inability by the State of California to assert this bar in as many as 140 or 82% of its 171 pending capital cases.

2. One magistrate judge has already recommended granting federal habeas corpus relief as to the penalty phase of a fifteen-year old capital case for a claim which the California Supreme Court found was procedurally barred because it was untimely. *Bean v. Calderon*, USDC E.D. Cal. CIV S-90-0648 WBS/GGH Findings and Recommendations dated January 23, 1997. A petition for certiorari is now pending in *Bean*, No. 96-1355.

Another federal district court has recently filed an order indicating that 4 claims would be remanded to the California Supreme Court for exhaustion but that if the claims were found to be procedurally barred, these findings would have no effect in federal court. *Chayim Ben-Sholom v. Calderon*, USDC Ed. Cal. No. F-93-5531-OWW, Order 2/7/97.

finality of its judgment and enforcement of its laws. Without the clear, and immediate guidance of this Court's review of the validity of California's rules of procedural bar, the numerous California capital cases in federal court will all be subject to this unnecessarily protracted litigation.

Pursuant to the compelling mandates of comity and federalism, federal courts generally will not review the merits of a claim in a petition for writ of habeas corpus if the state courts denied the claim on state procedural grounds that are both independent of federal law and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 731-732 (1991). The standard has been stated as follows:

> A procedural default is not "independent" if, for example, the state procedural bar depends upon an antecedent determination of federal law. Similarly, the procedural default is not "adequate" if the state courts themselves bypass the petitioner's default and consider his claims on the merits, if the procedural rule appears to be discretionary, or, ordinarily, if the state fails to assert an interest in compliance with its procedural rules in the petitioner's federal habeas proceedings.

Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). Courts have also observed that "[n]ovel procedural requirements or those of whose existence the defendant could not reasonably be deemed to have been apprised, cannot be permitted to thwart review. . . ." *NAACP v. Alabama, ex rel. Flowers*, 377 U.S. 288, 297 (1964). Similarly, another federal court observed that "[a] state ground is adequate only if the state court acts in a consistent and principled way. A basis of decision applied infrequently, unexpectedly, or freakishly may be

inadequate, for the lack of notice and consistency may show that the state is discriminating against the federal rights asserted." *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383 (7th Cir. 1990), citing *Johnson v. Mississippi*, 486 U.S. 578, 587-589 (1988). This Court also has held that, before a state procedural rule can be considered adequate and independent to bar federal court consideration, the rule "must have been 'firmly established and regularly followed' by the time as of which it is to be applied." *Ford v. Georgia*, 498 U.S. 411, 424 (1991). California believes it has followed these rules and that the Ninth Circuit may not disregard California's well-established procedural bars. The state submits that California's rules of procedural bar, both before and certainly after *Clark* and *Harris* were decided, meet these requirements.

A. California's Timeliness Requirements Were Applicable To Petitions For Writ Of Habeas Corpus In Capital Cases Filed Prior to 1993

California courts have consistently held that a state habeas petitioner must assert all claims known to him in a timely manner and that a petitioner must fully explain and justify any substantial delay in asserting known claims. *In re Clark*; *In re Stankewitz*, 40 Cal.3d 391, 396, n. 1 (1985); *In re Walker*, 10 Cal.3d 764, 774 (1974).

In June of 1989, the California Supreme Court published a detailed set of guidelines pertaining to the timeliness requirements applicable to state habeas petitioners in capital cases, entitled "Supreme Court Policies Regarding Cases Arising From Judgments of Death," (hereinafter "the Policies"). The Policies provided:

> 1--1 Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas

corpus. The duty to investigate is limited to investigating potentially meritorious grounds for relief that have come to counsel's attention in the course of preparing the appeal. It does not impose on counsel an obligation to conduct, nor does it authorize the expenditure of public funds for, an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment. Instead, counsel has a duty to investigate potential habeas corpus claims only if counsel has become aware of information that might reasonably lead to actual facts supporting a claim. All petitions for writs of habeas corpus should be filed without substantial delay.

1--1.1 A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 60 [now 90] days after the final due date for the filing of appellant's reply brief on the direct appeal.

1--1.2 A petition filed more than 60 days [now 90] days after the final due date for the filing of appellant's reply brief on the direct appeal may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim *and* (b) became aware, or should have become aware, of the legal basis for the claim.

1--1.3 Alternatively, a petition may establish absence of substantial delay if it alleges with specificity facts showing that although petitioner or counsel was aware of the factual and legal

> bases for the claim before January 16, 1986 (the date of finality of *In re Stankewitz* (1985) 40 Cal.3d 391, 396-397, fn. 1, the petition was filed within a reasonable time after that date.

See California Supreme Court, *Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and For Compensation of Counsel in Connection with Those Cases*, 50 Cal.3d 1-4 (Dec. 1993) (emphasis in original).

These were the standards in place in 1994 at the time Hayes filed his second state petition for writ of habeas corpus. Counsel also knew that these standards applied in 1989 to Hayes' case while his direct appeal was still pending before the California Supreme Court and in 1994, counsel sought to explain the delay in the filing of these clearly untimely claims when the second state habeas petition was filed. The language of these standards clearly indicate their applicability to Hayes' case while it was still active in the state courts.

The Ninth Circuit's position is that Hayes' procedural default must be examined at the time it occurred. Fair enough. However, according to the Ninth Circuit, the default occurred at some nebulous time prior to the California Supreme Court's 1993 decisions in *Clark* and *Harris* when Hayes consciously gambled that under California law he could freely file an infinite amount of untimely and successive petitions. This was never the law in California and in actuality, Hayes defaulted 35 of his claims on April 22, 1994, when he filed an untimely second petition without adequate justification for the delay.

B. The Ninth Circuit Incorrectly Concluded That California's Timeliness Procedural Requirements Were Not Independent And Adequate State Procedural Bars To Federal Review

In the instant case, 32 of the claims asserted by Hayes in his 1994 second Petition for Writ of Habeas Corpus were rejected by the California Supreme Court on the procedural grounds of being untimely. The Ninth Circuit concluded that the procedural bars relied upon by the California Supreme Court were not "adequate" to preclude federal review, especially in light of the California Supreme Court's decision in *In re Clark* at 750. The Ninth Circuit reasoned that, prior to *Clark*, California courts had not consistently applied *any* procedural bar in a consistent way, citing *Siripongs v. Calderon*, 35 F.3d 1308 (9th Cir. 1994), cert. denied, 115 S.Ct. 1175 (1995) and *Karis v. Vasquez*, 828 F.Supp. 1449 (E.D.Cal. 1993), and that to apply the timeliness bar to Hayes in the instant case would be an unfair retroactive application of the allegedly stricter timeliness standards articulated in *Clark*.

The crux of the Ninth Circuit's error is that the court has blurred the distinction between the California Supreme Court's analysis in *Clark* with respect to the successive petitions procedural bar and that of the timeliness procedural bar. Even the Ninth Circuit recognized in *Paradis v. Arave*, 954 F.2d 1483 (9th Cir. 1992) that, in evaluating the adequacy of state procedural bars, federal courts must focus on the particular procedural bar invoked in the case at hand. The fact that one particular state procedural bar may be subject to attack on the ground it has been inconsistently or irregularly applied does not justify the inference that a different state procedural bar has been inconsistently or irregularly applied. *Id.* at 1493; see *Moran v. McDaniel*, 80 F.3d 1261, 1996 U.S. App. Lexis 6101 (9th Cir. 1996) [upholding Nevada's untimeliness procedural bar while

distinguishing *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995), which found another Nevada bar based on a failure to object at trial inadequate to forestall federal review]. Disregarding *Paradis*, the Ninth Circuit in the instant case inferred from the admission in the *Clark* opinion that previously the successive petitions procedural bar had not been regularly and consistently applied in California that this same inconsistency applied equally to California's application of the timeliness procedural bar. Such an inference is erroneous as the histories of the two procedural bars, successive petitions and timeliness, are quite different. More importantly, nothing in *Clark* suggests that the California courts have not regularly or consistently applied the timeliness procedural bar, nor has it even been *proven* otherwise.

Any determination of the adequacy of California procedural bars requires an examination of *Clark* in which the California Supreme Court gave a complete analysis of several state procedural bars to petitions for writ of habeas corpus. The court examined, separately, both the successive petitions bar and the timeliness bar. *In re Clark* at 767-782. First, in reviewing the history and application of California's procedural bar to the filing of successive petitions, the court candidly admitted:

> Our past decisions have thereby suggested that the rules *against piecemeal presentation of claims* and repetitious petitions are subject to undefined exceptions and that the court may be willing to entertain multiple collateral attacks on a judgment notwithstanding the potential for abusive writ practice.

Emphasis added; *id.* at 768. It is this language that the Ninth Circuit has eagerly adopted and used to support its view that the decision in *Clark* signalled a drastic change in California's timeliness standards.

However, such reliance ignores the fact that the quoted language is found in the section of the state court opinion entitled "Repetitious and piecemeal claims" (*In re Clark* at 767), which limited itself to a discussion of California's two longstanding rules against repeated applications for relief on previously rejected claims and against piecemeal presentation of habeas claims. The Ninth Circuit turned a deaf ear to the California Supreme Court's assertions under the separate section entitled "Delay." There the California Supreme Court observed, "Our decisions have *consistently required* that a petitioner explain and justify any substantial delay in presenting a claim. [Citation omitted; emphasis added.]" *In re Clark* at 783. The state submits that, if the California Supreme Court's admission of inconsistent application of the bar against successive petitions prior to *Clark* is readily accepted by the Ninth Circuit without question or analysis, so too must it accept the California Supreme Court's express assertion of a consistent requirement that substantially delayed claims have had to be justified. Ninth Circuit law required that Court to presume that the California Supreme Court "has carried out its [state law] obligations even when it does not expressly indicate in its opinion that it has done so." *Beam v. Paskett*, 3 F.3d 1301, 1306 (9th Cir. 1993).

In rejecting the petitioner's argument in *Clark* that the Policies should not apply to him, the California Supreme Court observed, contrary to the Ninth Circuit here, that:

> Even before June 1989, a habeas corpus petitioner who had knowledge that grounds for a habeas corpus petition existed *was on notice* that any substantial delay in filing a petition after the grounds became known had to be justified. *In re Stankewitz* at 396, fn. 1.

Emphasis added; *id.* at 782. Moreover, the state court did not suggest that the publication of the Policies, or its decision in *Clark*, altered that court's longstanding approach to the timeliness bar. The Policies merely set forth a presumption of timeliness and referred directly to *Stankewitz*, as the appropriate standard for assessing timeliness. *In re Clark* at 783. Consequently, the court rejected an argument that the Policies changed any preexisting timeliness requirements. *Id.* at 785. To the extent the Policies did add a duty to counsel to investigate possible claims, the California court also allowed a state petitioner to present claims discovered as a result of investigation commenced promptly after the Policies became effective on June 6, 1989. *Ibid.*

Thus, contrary to the Ninth Circuit's conclusion, the California Supreme Court's holding in *Clark* did *not* indicate that its prior holdings with respect to the timeliness bar were inconsistently applied. And, importantly in the instant case, the California courts have always required that a state habeas petitioner justify any substantial delay in filing a habeas petition. Hayes knew this since he made an extensive but unsuccessful attempt in his second habeas petition to justify the delay in presenting his new claims. He failed as to 32 of these claims.

This case is unlike that of *Ford v. Georgia* at 411. In *Ford*, upon which the Ninth Circuit placed special emphasis, the Georgia Supreme Court changed the specific period in which a criminal defendant could challenge his jury selection/composition and preserve the issue for review to a time past that in which that petitioner could have complied. *Id.* at 422. This Court found that applying the novel rule retroactively would apply a rule unannounced at the time of trial (*id.* at 424-425), which apparently was the only time the issue could have been preserved. Not so in the instant case where the California high court was not called upon to exercise

discretion because Hayes gave the state court no real facts in his second state petition upon which justification for the delay could have been found as to all but eight of his 44 claims.

Unlike the defendant in *Ford*, Hayes was not absolutely deprived of his day in court in that he was given the opportunity to justify the substantial delay in presenting his 44 unexhausted issues to the state high court. Nor was the requirement of justification, whatever its form, a novel or unexpected rule applied without notice at a time when Hayes could not comply. *See, e.g., Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) [no problem of retroactivity noted where state court dismissed petitioner's third state petition, which, in that subsequent petition, cited no "cause" for raising claim that existed at time of first writ, even though the state court had not in the past regularly and strictly applied its abuse of the writ rules]; *Pearson v. Norris*, 52 F.3d 740 (8th Cir. 1995); also *Tredway v. Farley*, 35 F.3d 288, 292-295 (7th Cir. 1994). Without a showing by Hayes of adequate justification, the California Supreme Court followed its well established rule that such petitions be summarily denied. *In re Clark* at 797. Because California's timeliness requirements for capital habeas petitions were well-established and consistently applied in 1994 at the time Hayes unsuccessfully attempted to make such a showing, the Ninth Circuit stuck a mortal blow to the basic precepts of comity and federalism when it found that California's timeliness procedural bar was not an adequate state rule to foreclose federal review of the 32 issues belatedly raised by Hayes in his second state habeas petition.

II.

THE NINTH CIRCUIT HAS ADOPTED A RULE OF REJECTION WITHOUT ANY FACTUAL SUPPORT FOR THE NOTION THAT THE CALIFORNIA SUPREME COURT FAILED TO REGULARLY AND CONSISTENTLY APPLY ITS TIMELINESS PROCEDURAL BAR

Without ever considering if the factual premise of its holding was true, the Ninth Circuit has accepted as gospel, the proposition that the California Supreme Court did not regularly and consistently apply its timeliness bar prior to the 1993 opinion in *Clark*.

The authority cited by the Ninth Circuit for the truth of this proposition traces its questionable lineage back to *Karis v. Vasquez*, in which the district court held that since state court procedural bar findings amounted to an affirmative defense in a federal habeas corpus proceeding, the state had the burden of proving not only that the state court had applied the bar in that case but also that the California Supreme Court had also regularly and consistently done so in the past. It did not satisfy the district court that the California Supreme Court had expressly held in *Clark* that the timeliness bar had been regularly and consistently applied prior to the decision in that case. The district court still saw fit to place the burden of proof on the California Supreme Court to prove a negative rather than requiring the party challenging the bar to show that it had not been regularly applied.

Relying on *Karis*, the Ninth Circuit was also is unwilling to recognize that California courts had a valid, well established timeliness requirement which was in place well *before* the California Supreme Court's decisions in *Clark*, as well as a longstanding requirement prior to

Harris that issues that could have been raised on appeal could not be considered for the first time on habeas review. The rejection of California's timeliness procedural bar also results in the inevitable conclusion that, with respect to most of the capital cases pending in the district courts in California, the state cannot ever have valid successive petition, timeliness, or *Dixon* procedural bar that are recognized by the federal courts, regardless of how unjustifiable the failure to bring the claim, or how unreasonable the delay.

In short, the Ninth Circuit's ruling places a higher value on rewarding a state habeas petitioner for gambling that the federal courts will find that the state may not enforce its procedural rules, than the value placed on the state's valid interest in having its procedural rules recognized by the federal courts, and the concomitant state interest in the finality of its judgments. *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977). The Ninth Circuit's purported balancing of these interests, as evidenced in its ruling, is incorrect. Now, only this Court is in a position to stop this legal carnage and to correct the patent injustice which will result from adherence to the Ninth Circuit's erroneous order.

The factual proposition that California did not regularly and consistently apply its timeliness requirements prior to 1993 has never been proven. The rejection of California's long-standing timeliness bar is based solely on a burden of proof question.

It offends comity and federalism to require the California Supreme Court to prove that it has regularly applied its timeliness requirements in habeas corpus cases, especially where the state's highest court has expressly held that it has done so.

Rather than placing the burden of proof on the question of regular and consistent application on the state, the burden should instead be on the party challenging the application of the bar. Once the state has proved that the

bar was applied, it is the defendant who should have to prove that the bar was not regularly enforced if that is his assertion.

In this regard, it is erroneous to regard a state court procedural bar finding as an "affirmative defense" as that term is used in civil actions. Unless this court grants certiorari on this important issue, the Ninth Circuit's rule of rejection will continue to require that the California Supreme Court prove that it has regularly and consistently applied its timeliness requirements whenever enforcement of a bar is questioned.

Such a rule is demeaning and offends California's sovereignty and is contrary to the basic principles of comity and federalism. The first authority to hold that the state has the burden of proof was *Karis v. Vasquez*, which held that the state has the burden to establish that the default is adequate and regularly imposed.

California submits that such a burden, which appears to be both a burden of both proof and persuasion, is contrary to the presumption that judges act according to law. *U.S. v. Throckmorton*, 873 F.3d 1069, 1072-1073 (9th Cir. 1996). In addition, it is contrary to the shifting of the burden of proof in analogous defenses. Thus, *Goecke v. Branch*, ___ U.S. ___, 115 S.Ct. 1275 (1995) indicates that the burden is upon petitioner to identify existing precedent demonstrating inapplicability of *Teague v. Lane*, 489 U.S. 288 (1989). And *McCleskey v. Zant*, 499 U.S. 467, 494-495 (1991), places the burden on the state to plead abuse of the writ but then shifts the burden to petitioner to establish inapplicability of the bar. California is aware of no Circuit Court of Appeal or United States Supreme Court opinion which allocates this burden to show a negative to the state. In fact, the practice in the circuits is to the contrary. *See*, e.g., *Dugger v. Adams*, 489 U.S. 401, 410 (1989) (*petitioner's* citation to a few state cases where the procedural bar was ignored is insufficient to demonstrate inadequacy); *Smith v. Dixon*, 14

F.3d 956, 972 (4th Cir. 1994) (petitioner failed to demonstrate bar not consistently applied); *Wheat v. Thigpen*, 793 F.2d 621, 625 (5th Cir. 1986) (petitioner argues not uniformly applied); *Prihoda v. McCaughtry*, at 1383-1384 (7th Cir. 1990) (petitioner failed to demonstrate inadequacy of bar); *Wyles v. Hundley*, 59 F.3d 247, 252 (8th Cir. 1995) (petitioner's claims fail to consider bar applied in overwhelming majority of cases). On certain occasions, the Ninth Circuit follows the same procedure. In *Morales v. Calderon*, 85 F.3d 1387, 1389 (1966), it was the petitioner Morales who argued against application of the pre-*Clark* timeliness bar. And in *Forrest v. Vasquez*, 75 F.3d 562, 564 (9th Cir. 1996), the Ninth Circuit recited simply that there was nothing to indicate that the bar in that case was not firmly established. In other words, no burden was placed on the state to show that it was firmly established.

The same is true in this case. Nothing has ever been produced which indicates the timeliness bar is not firmly established and uniformly applied. The Ninth Circuit has simply assumed this to be true without any factual basis to support this assumption.

There is no indication from any case that delay is ignored. It is evident that an unexplained delay of seven years in petitioner's case is violative of the rule. The default should be honored by this Court.

The Ninth Circuit in the instant case, like the court in *Karis*, has ignored the distinction between the successive petitions bar and the timeliness bar. Even assuming the successive petitions bar, prior to the decision in *Clark*, would not have been an adequate state procedural bar to preclude federal review under *Siripongs*, the timeliness bar is not subject to the same analysis. The timeliness bar in California is longstanding; the Policies defining timeliness predated Hayes' second state habeas petition by nearly five years; the California Supreme Court's ruling in *Clark* predated Hayes' second state

habeas petition by almost one year. Thus, Hayes was clearly on notice that he was required to adequately justify any delay, and although he tried, he failed to do so. Application of the timeliness bar was not infrequently, unexpectedly, or freakishly applied to Hayes. *See Johnson v. Mississippi* at 587-589. Nor has proof ever been offered that the contrary is true. This Court should therefore grant certiorari to review the Ninth Circuit's finding that California's timeliness and successive petitions bars were not "adequate" to preclude federal review.

III.

THE NINTH CIRCUIT'S REJECTION OF CALIFORNIA'S FORTY-YEAR-OLD *DIXON* BAR IS UNJUSTIFIED UNDER ESTABLISHED PRINCIPLES OF COMITY AND FEDERALISM

In this case, the California Supreme Court found that three of the claims set forth in the second habeas corpus petition should have been raised in the direct appeal and were therefore procedurally barred under the state's forty-year-old *Dixon* bar.

The district court in this case denied the state's motion to dismiss and found that the *Dixon* bar had not been regularly and consistently applied before *Harris*. The question was presented to the Ninth Circuit.

Rather than deciding the question, the Ninth Circuit instead relied upon the clearly erroneous standard and upheld the district court's denial of the motion to dismiss.

Rather than decide whether California had regularly and consistently applied the bar before *Harris*, the Ninth Court contributed to the confusion in capital litigation in California by apparently allowing the district courts in this state to continue to decide this crucial question on a case by case basis. The Ninth Circuit did not provide any guidance on the issue nor did it decide the question. It simply held that a refusal to honor the bar was not clearly erroneous. By implication, an order dismissing a claim by upholding the bar would also be upheld under the clearly erroneous standard.

In doing so, the Ninth Circuit acknowledged that there is conflicting authority on this question within the circuit. There is even conflicting federal authorities on the basic question of why the bar should not be recognized.

Noting that *Karis* and *Odle* offer different reasons for refusing to recognize the *Dixon* bar, the Ninth Circuit still would not resolve the question.

In spite of the Ninth Circuit's recognition that the *Dixon* bar has been the law in California since 1953, the Court held that Hayes was not on notice in 1990 that he should raise the issues which were cognizable on appeal, in his automatic appeal or default them.

Again, the *Dixon* default did not occur when Hayes "had an opportunity to raise the claims on direct appeal" and instead occurred when Hayes waited, without adequate reasons, until 1994 to file claims in a successive habeas petition which were cognizable in his direct appeal. In *Deere v. Calderon*, 890 F.Supp. 893, 901 (C.D. Cal. 1995) the district court observed "[t]he California Supreme Court recognized the continuing vitality of [the *Dixon*] rule in *In re Harris*. . . ." More recently, in *Forrest v. Vasquez*, the Ninth Circuit indicated that the *Dixon* bar is applicable to preclude review of a claim in federal court.

It is true that the California Supreme Court stated in *Harris* that it would narrow the "fundamental constitutional rights" exception to the *Waltreus* (*In re Waltreus*, 62 Cal.2d 218 (1965) procedural bar [which precludes review on habeas of issues already decided on appeal], *see Harris*, at 834.[3] However, the court did not suggest that the narrowing of the exception was based on any inconsistent application of the bar in previous cases. Instead, the court reasoned that narrowing of the *Waltreus* exception was appropriate, given the expansion of the ineffective assistance of counsel doctrine, which frequently overlapped the "fundamental constitutional rights"

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3. Respondents recognize that *Harris* dealt specifically with the *Waltreus* procedural bar, which the court termed a "corollary of the rule in *Dixon*," *see Harris*, at 829; however, the court also made clear that much of its discussion equally applied to the *Dixon* rule. *See id.*, at 825, n. 3.

exception. *Id.* at 831-834. The court made no such explicit or implicit acknowledgment that its prior applications of the *Dixon* or *Waltreus* bar had been applied inconsistently. The court did state that achieving the proper balance between the state's weighty interest in the finality of judgments and the individual's right to a fair trial has not always been clear, *see Harris*, at 830; but the court did not suggest that the difficulty in balancing these competing interests was reflected by an inconsistent application of the *Waltreus* bar.

California acknowledges that in *Odle v. Calderon*, 884 F. Supp. 1404 (N.D.Cal. 1995), the district court held that the *Dixon* bar had not been regularly and consistently applied. *Id.* at 1413-1414. In *Odle*, the district court purported to "agree[] with the reasoning of three other district courts that the Dixon procedural rule has not been uniformly and regularly applied by the California Supreme Court."[4] *Id.* at 1413.

The third of these cases, *Karis v. Vasquez*, represents a misreading of California's application of the *Dixon* procedural bars. In *Karis*, the district court stated that the California courts "have repeatedly held that the rule that claims not raised on appeal are not cognizable

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4. The cases referred to by the district court were *Kimble v. Vasquez*, CV 90-4826 SVW (C.D.Cal. August 25, 1993); *Karis v. Vasquez*; *Murtishaw v. Vasquez*, CV 91-508 OWW (E.D. Cal. 1993).

Two of the three cases cited by the district court were unpublished opinions, and thus their precedential weight is negligible in light of Ninth Circuit Rule 36-3 which prohibits citation to unpublished orders or memoranda. In this same vein, it may be worth noting that several other unpublished orders have recognized the validity of California's procedural bar under *Dixon* and have applied it in federal habeas proceedings. *See Dull v. Pickett*, No. 94-56722 (9th Cir. June 12, 1995) at 4; *Velasquez v. Borg*, No. 93-16129 (9th Cir. April 15, 1994) at 3; *Sanchez v. Marshall*, No. 93-15309 (9th Cir. December 1, 1993) at 6; *Jones v. Vasquez*, C 91-3557 HP (N.D. Cal. June 3, 1994) at 13-14.

on habeas is 'merely a discretionary policy governing the exercise of the reviewing court's jurisdiction to issue the writ.'" *Karis*, at 1467, *quoting In re Wallace*, 3 Cal.3d 289, 292 (1970), and *In re Black*, 66 Cal.3d 881, 887 (1967). However, the California Supreme Court in *Wallace* made clear that the discretion was not unfettered. Rather, the court stated:

> [T]he "requirement of exhaustion of the appellate or other remedy . . . is merely a discretionary policy governing the exercise of the reviewing court's jurisdiction to issue the writ." *In re Black*, 66 Cal.2d 881, 887 (1967), *quoting* from Witkin, Cal. Criminal Procedure 769 (1967). *When special circumstances are shown,* compliance with this "requirement" may be excused and the petition may be considered on its merits.

In re Wallace, at 292. Italics added. Thus, understood in its proper context, the "discretion" of the court is limited to "special circumstances," just as other adequate procedural bars are also omitted by certain exceptions. Simply put, so long as "exceptions" are consistently applied, they do not undermine the adequacy of state procedural bars. *See Dugger v. Adams*, at n. 6; *Andrews v. Deland*, 943 F.2d 1162, 1190 (10th Cir. 1991); *Prihoda v. McCaughtry*, at 1383-1384.

It is therefore clear that *Harris* did not signal a recognition that the *Dixon* bar had been inconsistently applied; it only signalled a narrowing of the criteria for applying the bar. As such, the California Supreme Court's decision in *Harris* should not undermine, in any way, the adequacy of the *Dixon* bar to preclude federal review. And even if *Harris* did signal a significant change, it nevertheless gave Hayes a way to avoid the default by adequately explaining his failure to pursue certain claims

on appeal. However, because Hayes failed to do so, as evidenced by the California Supreme Court's order, there is no reason not to apply the *Dixon* bar to Hayes post-*Harris* petition.

As the district court in *Deere* highlighted, the *Dixon* rule had been law for the past 40 years. *Deere*, 890 F.Supp. at 901.

A survey of the California Supreme Court cases addressing *Dixon* from 1953 to 1993 reveals consistent application of a clearly stated rule that "habeas corpus cannot serve as a substitute for appeal." *In re Harris*, 5 Cal.4th 813, 829 (1993); *In re Jackson*, 3 Cal.4th 578, 586, fn. 2 (1992) [applying rule to reject claim]; *Mitchell v. Superior Court*, 49 Cal.3d 1230, 1236, fn. 2 (1989) [applying rule to reject several claims]; *In re Walker* [applying rule to reject claim]; *People v. Jones*, 9 Cal.3d 546, 560, fn. 7 (1973) [applying rule to reject claim]; *In re Brown*, 9 Cal.3d 679, 682 (1973) [applying rule to reject claim]; *People v. Morrison*, 4 Cal.3d 442, 443, fn. 1 (1971) [applying rule to reject several claims]; *In re Crow*, 4 Cal.3d 613, 622, fn. 9 (1971) [noting "special circumstances" exception]; *In re Terry*, 4 Cal.3d 911, 921 (1971) [applying rule to reject claim]; *In re King*, 3 Cal.3d 226, 229, fn. 2 (1970) [exception based on change in controlling law]; *In re Antazo*, 3 Cal.3d 100, 107-108 (1970) ["special circumstances" exception]; *In re Wallace* ["special circumstances" exception]; *In re Lopez*, 2 Cal.3d 141, 151 (1970) ["special circumstances" exception]; *In re Bushman*, 1 Cal.3d 767, 776 (1970) [exception based on unlawful sentence]; *In re Bevil*, 68 Cal.2d 854, 862 (1968) [exception based on unconstitutional statue]; *In re Malloy*, 66 Cal.2d 252, 254 (1967) [applying rule to reject claims]; *In re McGrew*, 66 Cal.2d 685, 688 (1967) [applying rule to reject claim]; *In re Black*, 66 Cal.2d 881, 886-887 (1967) [exception based on unlawful sentence]; *In re Ring*, 64 Cal.2d 450, 453 (1966) [rule applied to reject several claims]; *In re Spencer*, 63 Cal.2d 400, 406 (1965) [exception

based upon change in controlling law]; *People v. Polk*, 63 Cal.2d 443, 448 (1965) [exception based upon change in controlling law]; *In re Varnum*, 63 Cal.3d 629, 631 (1965) [exception based upon change in controlling law]; *In re Lessard*, 62 Cal.2d 497, 503 (1965) [applying rule to reject claim]; *In re Shipp*, 62 Cal.2d 547, 556 (1965) [applying rule to reject claims]; *In re Jackson*, 61 Cal.2d 500 (1964) [exception to rule based upon change in controlling law]' *In re Mitchell*, 56 Cal.2d 667, 671 (1961) [applying rule to reject claim]; *In re Harris*, 56 Cal.2d 879, 882-883 (1961) [applying rule to deny claim alleging violation of constitutional rights in admission of evidence]; *Neal v. State of California*, 55 Cal.2d 11, 16-17 (1960) [exception to rule based on "jurisdictional" defect]; *People v. Brown*, 55 Cal.2d 64, 74-75 (1960) [citing rule in support of holding that indigent defendant should be provided appointed counsel on appeal]; *In re Clark*, 51 Cal.2d 838, 841 (1959) [finding exception to rule where claim raises jurisdictional defect]; *In re Bine*, 47 Cal.2d 814, 817-818 (1957) [finding exception to rule where claim could not have been raised on appeal]; *In re Barges*, 44 Cal.2d 241, 247 (1955) [applying rule to reject claim]; *In re Chapman*, 43 Cal. 385, 390 (1954) [applying rule to reject claim]. *See also Acosta-Huerta v. Estelle*, 7 F.3d 139, 141-142 (9th Cir. 1992) ["California's general rule is that habeas corpus cannot serve as a substitute for appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not raised upon a timely appeal. . . . *People v. Sumstine*, 36 Cal.3d 909. . . . (1984)"].

Coincidentally,t he number of cases cited above where the rule was applied to bar the habeas claim matches the number of cases cited by this Court in finding that the Florida Supreme Court "faithfully applied its rule that claims not raised on direct appeal cannot be raised on postconviction review," and thus that the Florida

procedural bar equivalent to the *Dixon* rule constituted an "independent and adequate" ground to bar federal collateral review. *Dugger v. Adams*, at 410-411.

These egregious errors must be corrected or they will further mire California's attempt to enforce its death penalty in a sea of litigation in federal district courts over claims which have been found to be defaulted by the California Supreme Court. If comity and federalism are to have any real application to federal habeas corpus, California's independent state procedural bars must be treated with respect and deference by the federal courts.

CONCLUSION

Accordingly, for the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit in the case at bar.

Dated: April 22, 1997.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA

Respondent,

BLUFFORD HAYES, JR.,

Real Party in Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden, and JAMES GOMEZ, Director of the California Department of Corrections,

Petitioners,

v.

U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA (SACRAMENTO),

Respondent,

BLUFFORD HAYES, JR.,

Real Party in Interest.

No. 96-70729

D.C. No. CV-92-~~0963~~ 0603-DFL

OPINION

Petition for Writ of Mandamus
to the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Submitted September 15, 1996*

Filed December 20, 1996

Before: Betty B. Fletcher, John T. Noonan, Jr., and Michael Daly Hawkins, Circuit Judges

By Per Curiam Opinion

*The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P.34(a), Ninth Circuit R. 34-4.

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals denied a petition for a writ of mandamus. The court held that inconsistent application of a state habeas corpus relief timeliness requirement before the conclusion of a defendant's proceedings on direct appeal precludes its use as an adequate and independent state procedural bar to federal habeas corpus relief.

Real Party in Interest Blufford Hayes was convicted of capital murder and sentenced to death. In October 1987, he filed a state habeas corpus petition in the California Supreme Court. In May 1989, the court denied the petition on the merits. In April 1994, Hayes filed a second state habeas petition. On June 21, 1995, the court denied all claims on procedural grounds as untimely, improperly not raised on direct appeal, or previously raised.

In rejecting Hayes' claims as untimely the California Supreme Court relied on *In re Clark*, 855 P.2d 729 (1993), which held that a habeas petitioner must explain and justify any substantial delay in presenting a claim. The court also cited the Supreme Court Policies Regarding Cases Arising from Judgment of Death (Policies), which was published in June 1989.

As to its denial of other of Hayes's claims on the ground that he unjustifiably failed to raise them on direct appeal, the California Supreme Court cited *Ex Parte Dixon*, 264 P.2d (1953) which established the rule, and *In re Harris*, which reaffirmed its validity.

On Hayes' federal habeas corpus petition, petitioners Arthur Calderon, Warden of San Quentin Prison, and James Gomez, Director of the California Department of Corrections,

moved to dismiss 32 of Hayes' claims, citing the procedural bar of the California Supreme Court's June 21, 1995 decision.

The district court denied the motion to dismiss, ruling that before *Clark*, the untimeliness bar was not consistently applied, and therefore could not be used in Hayes' case as an adequate and independent state ground. The court also determined that the *Dixon* bar did not constitute an independent and adequate state procedural bar because it was not consistently applied before *Harris*, which was decided after all proceedings in Hayes' direct appeal had ended. Calderon and Gomez sought a writ of mandamus.

[1] Five factors are considered in determining whether to grant a writ of mandamus: (1) the petitioner has no other adequate appellate remedy; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error; (5) the district court's order raises new and important problems, or issues of law of first impression.

[2] Hayes' first state habeas petition was decided long before *Clark* was decided and the Policies were issued. A state procedural bar must be firmly established and regularly followed by the time as to which it is to be applied. [3] The focus was on the third factor, whether the district court's order was clearly erroneous as a matter of law, which was dispositive.

[4] Because pre-*Clark* requirements were not clear, consistently applied, and well-established, they could not serve as an adequate and independent state ground sufficient to support a procedural default. [5] Only if the state procedural bar is firmly established and regularly followed at the time the claim is raised will it serve to foreclose federal review.

[6] Both the Supreme Court and the Ninth Circuit supported the district court's position that the critical time to

judge Hayes' default was 1987, when he filed his first state habeas petition. The district court's finding was not clearly erroneous.

[7] Whether the *Dixon* rule was sufficiently clear and consistently applied before *Harris* was open to question. Given the lack of consensus on the adequacy of the *Dixon* bar in foreclosing federal review of state-court decisions, it could not be said that the district court clearly erred in determining that it was not consistently applied before *Harris*.

[8] Hayes' direct appeal ended before *Harris* was decided. Hayes had no notice that the *Dixon* bar would be consistently enforced when he had an opportunity to raise the claims on direct appeal, when the alleged default occurred. The district court's conclusion that the *Dixon* bar did not constitute an independent and adequate state bar was not clearly erroneous.

COUNSEL

William G. Prahl, Deputy Attorney General, Sacramento, California, for the petitioners.

No appearance for Real Party in Interest.

OPINION

PER CURIAM:

Arthur Calderon, Warden of the California State Prison at San Quentin, and James Gomez, Director of the California Department of Corrections, (Petitioners) seek a writ of mandamus directing the United States District Court for the Eastern District of California to grant Petitioners' motion for summary dismissal of 32 claims in an action of habeas corpus

brought against Petitioners by Blufford Hayes, Jr. (Hayes), a prisoner at San Quentin prison. In its April 10, 1996 order, the district court denied the Petitioners' motion for summary dismissal of Hayes' claims, holding that although the California Supreme Court held these claims to be procedurally barred, the grounds upon which that court reached its decision were not independent and adequate as applied to state habeas petitions filed before 1993 and federal habeas petitions relating to the same conviction filed after 1993 and therefore did not foreclose federal court consideration of the claims at issue.

[1] Petitioners urge us to direct the district court to vacate its judgment through the issuance of a writ of mandamus, a drastic remedy to be used only in extraordinary cases. *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). The Ninth Circuit has enunciated five factors to consider in determining whether to grant a writ: 1) the petitioner has no other adequate appellate remedy; 2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; 3) the district court's order is clearly erroneous as a matter of law; 4) the district court's order is an oft-repeated error; 5) the district court's order raises new and important problems, or issues of law of first impression. *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977). Petitioners contend that this case meets all five of the factors. We respectfully disagree.

FACTS

Hayes was convicted of one count of first degree murder with special circumstances of burglary and robbery and was sentenced to death. The special circumstance of robbery was reversed, but the remainder of the conviction and the death sentence were affirmed. *People v. Hayes*, 802 P.2d. 376 (1990).

Hayes filed for a writ of habeas corpus in the California Supreme Court on October 29, 1987; his petition was denied on its merits on May 18, 1989. Hayes filed a petition for a

writ of habeas corpus on June 22, 1993 in the United States District Court for the Eastern District of California. That proceeding was later stayed pending exhaustion of certain of Hayes' claims in state court. On April 22, 1994, Hayes filed a second state habeas petition. On June 21, 1995, the California Supreme Court denied all claims on procedural grounds as untimely, improperly not raised on direct appeal, or previously raised.

Hayes filed an amended petition for a writ of habeas corpus on June 14, 1995 in the United States District Court for the Eastern District of California. On July 18, 1995, Petitioners filed a motion to dismiss 32 of Hayes' claims for relief on the ground that these claims were procedurally barred based on the California Supreme Court's June 21, 1995, ruling. The magistrate judge recommended that Petitioners' motion be denied. The district court adopted the magistrate judge's findings and recommendation and denied Petitioners' motion.

[2] Specifically, the district court determined that in rejecting the majority of Hayes' claims as untimely, the California Supreme Court relied upon *In re Clark*, 855 P.2d 729 (1993). *Clark* held that a petitioner must explain and justify any substantial delay in presenting a claim for habeas relief. The court construed and relied on both existing California practice and "Supreme Court Policies Regarding Cases Arising from Judgment of Death" (Policies), a detailed set of guidelines pertaining to timeliness requirements applicable to state habeas petitioners in capital cases, published in June, 1989. Hayes' first state habeas petition was decided on May 18, 1989, long before *Clark* was decided and before the Policies were issued. The district court held that before *Clark* the untimeliness bar was not consistently applied, so that it could not be applied to Hayes' case as an adequate and independent state ground for decision. A state procedural bar must be "firmly established and regularly followed by the time as to which it is to be applied." *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (internal quotations omitted).

The California Supreme Court denied others of Hayes' claims on the grounds that he unjustifiably failed to raise them on direct appeal, citing *Ex parte Dixon*, 264 P.2d 513 (1953), which established the rule, and *In re Harris*, 855 P.2d 391 (1993), which reaffirmed its continued vitality and narrowed the available exceptions to the rule. The district court held that the *Dixon* bar did not constitute an independent and adequate state procedural bar because it was not consistently applied before *Harris*, which was decided after all proceedings in Hayes' direct appeal had ended.

ANALYSIS

In deciding whether to grant the rare writ of mandamus we have consistently applied the criteria established by *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977). We have also recognized the possibility of taking into account "other compelling factors relating to the efficient and orderly administration of the district courts." *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1301 (9th Cir. 1982), *aff'd sub nom. Arizona v. U.S. Dist. Ct.*, 459 U.S. 1191 (1983). The burden is on a petitioner seeking a writ to show that his "right to the writ is clear and indisputable." *Executive Software North Am. v. U.S. Dist. Ct.*, 24 F.3d 1545, 1551 (9th Cir. 1994) (internal quotations omitted).

[3] We focus here on the third *Bauman* factor, whether the district court's order is clearly erroneous as a matter of law. *See Executive Software*, 24 F.3d at 1551 ("it is clear that the third factor, the existence of clear error as a matter of law, is dispositive"); *Survival Sys. v. U.S. Dist. Ct.*, 825 F.2d 1416, 1418 (9th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988) ("When the district court's order is correct as a matter of law, it is obvious that the writ of mandamus should not be issued.").

[4] In *Calderon v. U.S. Dist. Ct.*, 96 F.3d 1126 (9th Cir. 1996), we pointed out that the California Supreme Court

acknowledged in *Clark* that "no clear guidelines [regarding departure from the habeas corpus rules] have emerged in our past cases." *Id.* at 1130. Although the State argued in *Calderon*, as it argues here, that California courts regularly and consistently applied the timeliness procedural bar even before *Clark*, this argument was rejected. *Id.* (citing *Morales v. Calderon*, 85 F.3d 1387 (9th Cir.)) (finding no discernible pre-*Clark* timeliness requirements), *cert. denied*, __ U.S. __, 1996 WL 526377 (1996). Because pre-*Clark* requirements were not "clear, consistently applied, and well-established," the court found that they could not serve as an adequate and independent state ground sufficient to support a procedural default. *Id.*

[5] Petitioners argue alternatively that even if the timeliness bar has been applied consistently only since *Clark*, we should apply the bar to Hayes' second state petition, filed after *Clark*. They rely on *Deere v. Calderon*, 890 F. Supp. 893 (C.D. Cal. 1995), which applied the timeliness bar to a second state habeas petition filed after *Clark* where the first state petition was filed before *Clark*. The district court rejected the argument and criticized *Deere* as contrary to Supreme Court and Ninth Circuit authority, holding that in order for a litigant to have a fair opportunity to comply with known procedural rules, the controlling state procedural bar is the one in place at the time the claim should have been raised. Only if the bar is "firmly established and regularly followed" at that time will it serve as an adequate ground to foreclose federal review; otherwise, it will not. *Ford v. Georgia*, 498 U.S. 411, 424 (1991). *See also English v. United States*, 42 F.3d. 473, 478 (9th Cir. 1994); *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994).

[6] The district court found the critical time to judge Hayes' default to be 1987, when he filed his first state habeas petition and failed to raise all of his claims. The state argues that he defaulted on his claims in 1994, when he filed his second state petition. Both Supreme Court and Ninth Circuit precedent

support the district court's position; we conclude it was not clearly erroneous.

The California Supreme Court denied other claims in Hayes' second state habeas petition on the ground that he unjustifiably failed to raise those issues on direct appeal. In doing so, that court cited *Ex parte Dixon*, 264 P.2d 513 (1953), which established the rule, and *In re Harris*, 855 P.2d 391 (1993), which reaffirmed the rule's continued vitality and narrowed the available exceptions to the rule.

[7] The district court held that the *Dixon* bar did not constitute an independent and adequate state procedural bar because it was not consistently applied before *Harris*. Whether the *Dixon* rule was sufficiently clear and consistently applied before *Harris* is open to some question. *Calderon v. U.S. Dist. Ct.*, 93 F.3d at 1131. *Compare Odle v. Calderon*, 884 F. Supp. 1404, 1413 (N.D. Cal. 1995) ("the *Dixon* procedural rule has not been uniformly and regularly applied by the California Supreme Court"), *and Karis v. Vasquez*, 828 F. Supp. 1449, 1467 (E.D. Cal. 1993) (holding that adherence to the *Dixon* rule was purely discretionary before *Harris*), *with Harris*, 855 P.2d at 396 (The *Dixon* "rule is now firmly established and often repeated without much explication."), *and Deere*, 890 F. Supp. at 901. Given the lack of consensus on the adequacy of the *Dixon* bar in foreclosing federal review of state court decisions, we cannot say the district court clearly erred in determining that it was not consistently applied before *Harris*.

[8] Petitioners argue that, even if *Dixon* was not consistently applied before *Harris*, it is fair to apply the *Dixon* bar to Hayes because *Harris* put Hayes on notice that he must justify any failure to raise claims on appeal or lose the ability to raise them on habeas review. We find no merit in the argument. Hayes' direct appeal ended before *Harris* was decided. Hayes had no notice that the *Dixon* bar would be consistently enforced when he had an opportunity to raise the claims on direct appeal, the time at which the alleged default occurred.

The district court's conclusion that the *Dixon* bar did not constitute an independent and adequate state bar to Hayes' federal habeas petition was not clearly erroneous.

Accordingly, the petition is **DENIED.**

APPENDIX B

Supreme Court
FILED
JUN 21, 1995
Robert Wandruff Clerk
/s/ deputy

No. S039415

IN THE SUPREME COURT OF CALIFORNIA

IN BANK

IN RE BLUFFORD HAYES, JR.

ON

HABEAS CORPUS

The petition for writ of habeas corpus, filed in this court on April 22, 1994, is denied. All claims are denied on the merits, except claims 3, 6, and 10. In addition, all claims are denied as untimely, except claims 1, 3, 4, 7, 26.5, 31, 32, 40, 41, 42, and 43. (See in re Clark, (1994) 5 Cal.4th 750, 797; In re Swain (1949) 34 Cal.2d 300, 304.) Claims 3, 7, 26.5, 31, and 32 are denied on the ground that they have previously been raised and rejected, either on direct appeal or by the previous petition for writ of habeas corpus (Crim.25356 - S004421). (In re Harris (1993) 5 Cal.4th 813, 827-829; In re Waltreus (1965) 62 Cal.2d 218; In re Miller (1941) 17 Cal.2d 734, 735.) Claims 6, 8, and 39 are denied on the ground that they could have been, but were not, raised on direct appeal. (In re Dixon (1953) 41 Cal.2d 756.) Claim 27 is denied as duplicative of claim 19.

The Motion to Recall Remittitur, Reinstate Appeal, and Reverse Judgment Pursuant to People v. Fuentes (1991) 54 Cal.3d 707, filed in this court on July 1, 1994, as an adjunct to the petition for writ of habeas corpus, is denied.

Mosk, J. is of the opinion the petition should be denied only on the merits.

/s/

Chief Justice

APPENDIX C

FILED
JAN. 22, 1996
Clerk, U.S. District Court
Eastern District of California
/s/ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BLUFFORD HAYES, JR.,

Petitioner,

vs.

DANIEL VASQUEZ,

Respondent

_____/

No. CIV S-92-0603
DFL GGH P

DEATH PENALTY CASE

FINDINGS AND RECOMMENDATION

Introduction and Summary

Respondent has moved to dismiss 32 claims in the amended petition filed in this case on the grounds that the claims are procedurally barred (defaulted)[1/]. The basis

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1/ These Findings and Recommendations will use the words "bar" and "default" interchangeably.

of two procedural bars claimed are untimeliness, In re Clark, 5 Cal.4th 750, 797, 21 Cal.Rptr.2d 509 (July 29, 1993), and failure to raise claims on direct appeal, In re Dixon, 41 Cal.2d 756, 264 P.2d 513 (1953). For the reasons expressed below, this court recommends that the motion to dismiss be denied on these grounds. Certain other claims were rejected by the state supreme court on account that the claims had previously been raised on direct appeal or in a prior habeas proceeding. In re Harris, 5 Cal.4th 813, 827-829, 21 Cal.Rptr.2d 373 (1993); In re Waltreus, 62 Cal.2d 218, 42 Cal.Rptr. 9 (1965). Of course, this latter bar, while certainly effective to preclude further state review, is not a bar to federal court review of a habeas corpus claim at all.[2/]

2/ One other claim was denied as duplicative. Such a statement by the California Supreme Court is not meant as a procedural bar; it is simply a statement of fact that two claims are indistinguishable from one another. The court will decide whether any federal claims stated are duplicative.

Procedural History

Petitioner was convicted on one count of first degree murder with special circumstances of burglary and robbery; he was sentenced to the death penalty on January 22, 1982. The robbery special circumstance was reversed in People v. Hayes, 52 Cal.3d 577, 276 Cal.Rptr. 874 (December 31, 1990), rehearing denied March 13, 1991, but the remainder of the conviction, including the death sentence, was affirmed. A petition for certiorari was sought on July 11, 1991, but certiorari was denied on November 11, 1991. Acting in propria personam, petitioner filed a request for counsel in this federal court on April 14, 1992, for the purpose of acquiring representation in federal habeas corpus proceedings. After a good bit of difficulty in locating counsel to represent petitioner, counsel was finally appointed on October 27, 1992.[3/] Petitioner thereafter filed his initial

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3/ At one point, this court informed the selection committee for counsel to either have counsel proposed to this court by a date certain, or the court would "involuntarily" appoint counsel. Proposed counsel were proffered just prior

federal petition for habeas corpus on June 22, 1993. On February 4, 1994, federal proceedings were stayed pending exhaustion of claims that had not been presented to the California Supreme Court.

The state petition on exhaustion was filed shortly thereafter (April 22, 1994), and on June 21, 1995, the California Supreme Court denied all claims on the merits except 3, 6, and 10 (as presented in the state petition). The Supreme Court went on to deny all claims as untimely except claims 1, 3, 4, 7, 26.5, 31, 32, 40, 41, 42, and 43. In addition, enumerated claims 6, 8 and 39 were denied as having not been raised on direct appeal, when the claims should have been. Finally, several claims were denied as having been raised once before (3, 7, 26.5 31, and 32). It is not necessary to describe any of the claims at issue in this motion since the various procedural bars imposed by the California Supreme Court do not expressly relate to the

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to the date for involuntary appointment.

substance of any claim. Moreover, since the recommendation herein is to deny respondent's motion in its entirety, and the denial does not relate to the substance of any claim brought, a listing of each claim in the text of these Findings is unnecessary. However, for the sake of completeness, Attachment A to these Findings and Recommendations lists the various state claims at issue in this order and gives their federal counterpart as identified in the amended federal petition.[4/]

1. Legal Standards

Based on concerns of comity and federalism, federal courts will not review federal questions presented by a habeas petition if a prior state court decision denying relief to the petitioner rests on a state procedural rule that is independent of federal law and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct.

4/ The court's list is derived from the list of claims submitted by respondent; the court appreciates counsel's efforts in this regard.

2546 (1991); Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038 (1989). A federal court faced with an ambiguous state court decision presumes that there is no bar to the federal court's consideration of federal claims; procedural bar will not be applied "unless the last state court rendering a judgment on the case clearly and expressly states that its judgment rests on a state procedural bar." Harris v. Reed, 489 U.S. at 263, 109 S.Ct. at 1043 (citations omitted). Federal questions should be reached only when it "'fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for that decision.'" Coleman at 735, 111 S.Ct. at 2556.

To be independent of federal law, a state procedural practice must not "depend upon an antecedent determination of federal law." Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). To be adequate, a state

procedural practice must be "clearly defined," id. at 1462, "firmly established," James v. Kentucky, 466 U.S. 341, 348-51, 104 S.Ct. 1830, 1835-1836 (1984), and "regularly followed," Id. A rule is regularly followed if it is applied in "the vast majority of cases." Dugger v. Adams, 489 U.S. 401, 410 n. 6, 109 S.Ct. 1211, 1217 (1989). The Ninth Circuit has explained the adequate state ground requirement as follows:

> [T]he procedural default is not "adequate" if the state courts themselves bypass the petitioner's default and consider his claims on the merits, if the procedural rule appears to be discretionary, or, ordinarily, if the state fails to assert an interest in compliance with its procedural rules in the petitioner's federal habeas proceedings.

Harmon, 959 F.2d at 1461 (citations omitted).

However, as long as the state court has identified as an alternative ground for denying a claim, an independent and adequate state ground, it is of no dispositive

significance that the state court reached the merits also. Harris v. Reed, 489 U.S. at 264 (n.10), 109 S.Ct. at 1044.

If the state court decision is supported by an independent and adequate state ground, the federal court may still consider the claim if the petitioner demonstrates: (1) cause for the default and actual prejudice resulting from the alleged violation of federal law, or (2) a fundamental miscarriage of justice. Harris, 489 U.S. at 262, 109 S.Ct. 15 1043 (citing Murray v. Carrier, 477 U.S. 478, 485, 495, 106 S.Ct. 2639, 2644 (1986)). "'[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" McCleskey v. Zant, 499 U.S. 467, 493-94, 111 S.Ct. 1454, 1469-1470 (1991) (quoting Murray, 477 U.S. at 488). Examples of cause include showings "that the factual or legal basis for a claim was not reasonably available to counsel," "that some interference by officials

made compliance impracticable," or "of ineffective assistance of counsel." Murray, 477 U.S. at 488, 106 S.Ct. at 2645. The Court has limited the "fundamental miscarriage of justice" exception to those who can show actual innocence, id. at 490; Noltie v. Peterson, 9 F.3d 802, 806 (9th Cir. 1993), including actual innocence of the death penalty, Smith v. Murray, 477 U.S. 527, 537-38, 106 S.Ct. 2661 (1986); Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514 (1992).

2. Untimeliness

In this case, citing In re Clark, supra, the California Supreme Court denied many claims on the grounds that they were untimely brought. However, because the final state decision on direct appeal and initial habeas review were filed before Clark was issued, the issue initially presented in determining whether Clark may be applied is not whether Clark itself stands as a precedent forbidding the filing of untimely petitions, but whether Clark was a

pronouncement of a new rule to this effect, or whether Clark was merely reaffirming a longstanding practice.

In general, respondent claims that Clark is applicable for two reasons:

1. Clark reaffirmed a longstanding California rule barring the filing of untimely petitions;

2. In any event, Clark applies because the state petition on exhaustion was not filed until after Clark was issued.

For reasons given below, the first point, although arguable, is ultimately flawed due to binding precedent and inconsistencies in the Clark opinion itself. The second point is not meritorious due to the fact that the consistency for which a procedural bar has been applied, i.e., the validity of the procedural bar, is measured from the time a petitioner's default is first present, not at the time petitioner ultimately files his "defaulted" claims.

The Ninth Circuit, in an opinion that is difficult to decipher in terms of the precise procedural bars being addressed, held:

> The California Supreme Court has recently held that the procedural bars the state relied upon are discretionary, and have not been applied consistently. [citing In re Clark]

Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994).

Nowhere in the entire opinion did the Ninth Circuit specify precisely what procedural bars the state had expressly relied upon in its brief, and the order of the California Supreme Court was completely non-explanatory in this respect. One is left to divining what procedural bars the Ninth Circuit perceived as having been raised by the state in its briefs (and ruled upon by the California Supreme Court) in its later discussion of "subsequent," "successive" and "piecemeal" petitions. Siripongs held that its piecemeal petition was not procedurally barred. Clark itself discussed piecemeal, successive and delayed (untimely) petitions. However, even

respondent in this case concedes that the state supreme court itself was attempting to clear up inconsistencies of procedural bar application: "Our past decisions have thereby suggested that the rules against piecemeal presentation of claims and repetitious [successive] petitions are subject to undefined exceptions and that the court may be willing to entertain multiple collateral attacks on a judgment notwithstanding the potential for abusive writ practice." In re Clark, 5 Cal.4th at 768, 21 Cal.Rptr.2d at 520.

Respondent notes, however, that Clark made a different statement for its delay (untimeliness) rules——and respondent is correct. "Our decisions have consistently required that a petitioner explain and justify any substantial delay in presenting a claim." In re Clark, 5 Cal.4th at 783, 21 Cal.Rptr.2d at 530. The problem with respondent's (and Clark's) pronouncements is that in the circumstances of this case, and Siripongs as well, there is absolutely no meaningful distinction between claims brought

in a "piecemeal" fashion and claims brought with undue "delay"——a claim brought in a piecemeal fashion is a delayed claim and vice versa.[5/]

Therefore, because the factual setting of Siripongs and the present case match in terms of when the new claims were presented to the California Supreme Court, this court believes that the result in Siripongs of not applying the procedural bar because of alleged piecemeal presentation of claims must be matched here. There can be no doubt that the claims in Siripongs, like the claims here, were substantially delayed as present standards would measure the delay. Respondent must attempt to have Siripongs overturned before this court could consider the matter

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5/ The court notes the absurdly remote possibility that a claim could be brought in a piecemeal fashion, but within the relatively short time-frame for a timely claim, i.e., petitioner would be filing new claims within days of one another. However, that remote possibility is not at issue in this case or the vast majority of cases where new claims have been brought long after the initial state proceedings are terminated.

further. See also, Karis v. Vasquez, 828 F.Supp. 1449, 1462-1464 (E.D.Ca. 1993).

The court is not stating that petitioner had a "right" under older California law to file a delayed or piecemeal petition. But the issue to be resolved here is different from that just posited. That issue, again, is whether the procedural bar of delayed or piecemeal petitions was consistently applied. The Ninth Circuit has held that it was not. However, the court expresses no opinion herein concerning the validity of a Clark procedural bar for convictions which were final subsequent to Clark.

Respondent's second point, which assumes the present validity of Clark, is that even if Clark is not retroactively applied, the petition on exhaustion in this case was filed subsequent to Clark; hence, petitioner's new claims presented in that petition are governed by the Clark rule. However, respondent's point is contrary to established

precedent concerning the time at which one measures the validity of a procedural bar.

A litigant must have a fair opportunity to comply with known procedural rules. In order to provide this fair opportunity, the state procedural bar at issue is the one in place at the time the claim should have been raised. Ford v. Georgia, 498 U.S. 411, 424, 111 S.Ct. 850, 857 (1991). In Ford, the state supreme court had established a new procedural rule governing the timely assertion of a Batson claim. The state court then retroactively applied the new rule to bar the petitioner's Batson claim. The Supreme Court found that since the rule was not firmly established at the time the petitioner should have raised the claim, it was inadequate to bar federal review. 498 U.S. at 424-25, 111 S.Ct. at 857-858. This circuit, citing Ford, has acknowledged that the applicable procedural bar to consider is the one in effect "at the time of the petitioner's purported

default." Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994).[6/] [7/]

6/ Deere v. Calderon, 890 F.Supp. 893 (C.D. Cal. 1995) briefly addresses the application of Clark to a procedural default which took place prior to the Clark opinion. In Deere, petitioner filed a first petition prior to Clark and a second petition after Clark. The second petition had been denied as untimely by the California Supreme Court, citing Clark. The Deere court found that the California Supreme Court had consistently applied the Clark standards to the nine habeas petitions filed after Clark. The Deere court thus concluded that Clark's timeliness rule was adequate to bar federal review. In reaching that conclusion, the court only briefly addressed the retroactivity issue:

> It is not unfair or unjust to now honor the procedural bar in the face of the previous ruling of inconsistency in California. Clark did not change the requirements for filing state habeas petitions in California. Clark merely put petitioners on notice that previously established standards would be followed.

890 F.Supp. at 900. (continued)

In summarily determining that retroactivity was not a problem, the district court in Deere failed to examine the retroactivity issue as applied to the law of procedural default. In this respect, Deere is contrary to Supreme Court and Ninth Circuit authority. To the extent

Therefore, the claims procedurally denied by the California Supreme Court on the basis of delay (untimeliness) are not barred from review by this court.[8/]

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that Deere holds that Clark does not announce a new rule, this court believes the Deere holding to be inconsistent with Siripongs.

7/ The court proposes no holding on the post-Clark situation where a petitioner unduly delays filing his state petition on exhaustion after his initial federal petition has been stayed. In such a case a theory of "continuing default" might apply.

8/ The court need not discuss at length petitioner's alternative contention that the procedural bar rulings of the California Supreme Court herein were not independent of federal law. Suffice it to say here that the court disagrees with petitioner. Alternative holdings on the merits and state procedure which are clearly differentiated as such do not preclude imposition of procedural bar. Harris v. Reed, supra. Moreover, simply because a state's procedural rule contains some limited exceptions (such as fundamental miscarriage of justice), whose scope is clearly defined, does not mean that the bar is interwoven with federal law or subject to discretionary application. The exception in a state's procedural rule set forth in McKenna v. McDaniel, 65 F.3d 1483 (9th Cir 1995)——"plain error or issues of constitutional dimension" is so broad as to encompass all of federal habeas review issues. The McKenna court was not discussing a limited exception.

The court further disagrees with petitioner that the California Supreme Court did not clearly state its reliance on procedural bar, or that the state supreme court

3. Claims Previously Timely Raised On Direct Appeal Or Initial State Habeas Corpus, But Which Were Raised Again In The Petition On Exhaustion Are Obviously Not Barred From Review In Federal Court

Respondent's theory——that the California Supreme Court's ruling that it would not review claims it had already reviewed states a procedural bar to federal habeas review——ignores controlling authority. Obviously, for its own purposes, the state supreme court is entitled to rule that it will not review the same claim again. However, if that claim has never been ruled upon in federal habeas review, the asserted bar that the claim has been "exhausted too much" has nothing to do with the independent and adequate state ground rationale for the preclusion of federal review. This court agrees with petitioner's argument:

> A denial [by the state supreme court] based upon previously raising a claim is not a procedural default. Ylst v. Nunnemaker, 501 U.S. 797 (1991) (A reference to In re Waltreus, 62 Cal.2d 218.... merely stands for

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did not have the power to declare procedural bars (a state law issue).

> the proposition that an 'ordinary state rule barring relitigation of claims raised on direct appeal" has "no bearing upon [petitioner's] ability to raise [the] claim in federal court." Id. at 806). See also, Maxwell v. Sumner, 673 F.2d 1031, 1034-35 (9th Cir. 1982).

Petitioner's Opposition at 21.

In the future, respondent should refrain from making the argument made herein. There is no basis in controlling law for the argument.

4. The Dixon/Harris Bar Does Not Preclude Federal Review——At Least For Cases In Which The Termination of the Direct Appeal Occurred Prior To The Harris Ruling

The California Supreme Court's rule precluding consideration in a petition for habeas corpus of a claim which could have been, but was not raised on appeal, has been known as the Dixon rule. See In re Dixon, 41 Cal.2d 756, 759, 264 P.2d 513 (1953). In re Harris, cited by the California Supreme Court herein in denying petitioner's state habeas petition along with Dixon, announced the court's intention to apply the Dixon rule

consistently in the future. Harris also expressed a longstanding adherence of California courts to the Dixon rule. However, as previously discussed, the procedural practice applicable to petitioner in this instance would be the one in existence at the time of his direct appeal. At the time of the ruling on petitioner's direct appeal, the Dixon rule was not adequate to preclude federal court consideration of a claim because it was not in fact consistently applied by the California Supreme Court. Odle v. Calderon, 884 F.Supp. 1404, 1413 (N.D. Cal. 1995); Karis, 828 F.Supp. at 1467.

Karis cited several California cases that held the adherence to the Dixon rule (referenced as the Terry rule in Karis) was purely discretionary. See, In re Wallace, 3 Cal.3d 289, 292, 90 Cal.Rptr. 176, 178 (1970): "But the '"'requirement of exhaustion of the appellate or other remedy ... is merely a discretionary policy governing the exercise of the reviewing court's jurisdiction to issue the writ.'"'" For example, the cases indicate that the

California courts will not apply their procedural "failure to appeal" rule whenever failure to review the sufficiency of the evidence would violate due process. In re Giannini, 69 Cal.2d 563, 577 (n.11) (1968), disapproved on other grounds Crownover v. Musick, 9 Cal.3d 405, 430 (1973).[9/] In expressing a longstanding adherence to the Dixon rule, the state supreme court did not cite to its contrary authority. However, in this court's canvassing of the California cases, such authority may not be ignored.

Conclusion

IT IS HEREBY RECOMMENDED that the motion to dismiss all claims referenced by the California Supreme Court as procedurally barred should be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the

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9/ Crownover itself was overruled in Morris v. Municipal Court, 32 Cal.3d 553 (1982) on grounds not pertinent here.

case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within **twenty (20)** days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten (10) days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

DATED: January ____, 1996.

_____
GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

GGH:gh:dn
hayes.fr

(Attachments not included)

APPENDIX D

FILED
APR 10, 1996
Clerk, U.S. District Court
Eastern District of California
/s/ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BLUFFORD HAYES, JR.,

Petitioner, No. CIV S-92-0603
DFL GGH

v.

ARTHUR CALDERON, et al.,

Respondents DEATH PENALTY CASE

ORDER

_____/

On January 22, 1996, the magistrate judge filed findings and recommendations addressing respondents' motion to dismiss. This matter was previously referred to the magistrate judge under 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262. The magistrate judge recommended that the motion be denied.

Respondents then filed objections and petitioner has responded to the objections. I have reviewed the objections and the motion. I find that the motion should be denied for the reasons stated in the findings and recommendation which I now adopt.[1/]

The motion to dismiss is DENIED.

DATED: 9 April 1996

UNITED STATES DISTRICT COURT
/s/

1. At page 12 of the findings and recommendations there is dicta that may be read to suggest that a citation to In re Waltreus, 62 Cal. 2d 218 (1965), guarantees that the claims at issue may be considered on their merits in federal habeas corpus. The import of this statement is accurate in the context of this case but over broad. See Forrest v. Vasquez, 75 F.3d 562 (9th Cir. 1996).

MOTION FILED
MAY 30 1997

No. 96-1755

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,
Respondent,

BLUFFORD HAYES, JR.,
Real Party in Interest.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a state court denies, as untimely, a habeas petition which is not filed within a reasonable time after clarification of the state's timeliness rules, is the state bar "inadequate" for the purpose of the procedural default rule in federal habeas corpus?

2. Are state procedural default rules "inadequate" simply because they are phrased in terms no less precise than comparable federal rules?

3. In determining whether a state court "regularly follows" a procedural default rule, should cases in which petitions are denied under one rule be considered a failure to follow all other rules that may be alternate grounds for denial?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden,

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vs.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

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Real Party in Interest.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

In the accompanying brief, *amicus* argues that the massive impact of this line of cases on California, the conflict with other circuits regarding the specificity required of procedural default rules, and the Ninth Circuit's extreme and unprecedented interpretation of the requirement that a default rule be regularly followed make this case appropriate for review.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The Ninth Circuit's refusal to respect California's delayed petition rule in the present case and the cases on which it relies has needlessly delayed enforcement of the state's death penalty, reducing its deterrent effect. Those delays are contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

May, 1997

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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IN THE

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

On January 1, 1980, Blufford Hayes murdered Vinod Patel in the course of a burglary.[1] He was convicted of these crimes and sentenced to death. *People* v. *Hayes*, 52 Cal. 3d 577, 597, 802 P. 2d 376, 387 (1990). Hayes filed a petition for a writ of habeas corpus in the California Supreme Court in 1987, which was denied on May 18, 1989. *Calderon* v. *U. S. District Court (Hayes)*, 103 F. 3d 72, 73 (CA9 1996). Shortly thereafter, on June 6, 1989, the California Supreme Court announced specific

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover. No outside contributions were made to the preparation or submission of this brief.

standards regarding the long-established rule that habeas petitions in capital cases be filed in a timely manner. *Id.*, at 74. In 1990, the California Supreme Court affirmed Hayes' conviction and sentence on direct appeal. *Hayes*, 52 Cal. 3d, at 646, 802 P. 2d, at 420. This Court denied certiorari on November 12, 1991. *Hayes* v. *California*, 502 U. S. 958 (1991).

In 1993, Hayes filed his first habeas petition in federal court, which was stayed pending exhaustion of all claims in state court. *Calderon* v. *U. S. District Court (Hayes)*, 103 F. 3d, at 73. Hayes then filed, in 1994, a second habeas petition in the California Supreme Court, nearly five years after the announcement of California's timeliness standards. *Ibid.*

The California Supreme Court denied 32 claims on procedural grounds. *Id.*, at 73-74.

Hayes returned to the federal District Court and filed an amended habeas petition. *Ibid.* The District Court denied the state's motion to dismiss 32 of the claims as procedurally barred. *Id.*, at 74. The state's petition for a writ of mandamus was denied by the Court of Appeals. *Id.*, at 75.

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit in this case and other cases of the same line will impose a massive burden of unnecessary litigation on California.

By focusing on the filing of the first petition as the time of default, the Ninth Circuit overlooked the nature of timeliness rules. A failure to file a petition within a reasonable time is a continuing default, commencing with the time the petition should have been filed and continuing until the petition is filed. Changes in timeliness rules can and should apply to a continuing default, so long as the person subject to them is allowed a reasonable time to file after any adverse change.

California's timeliness rule was "clearly established," at the absolute latest, on June 6, 1989, with the announcement of the

California Supreme Court Policies. Hayes' state petition raising the claims at issue here was not filed until almost five years later.

The Ninth Circuit is in conflict with other circuits regarding the degree of specificity a state procedural rule and its exceptions must have to be considered "adequate" on federal habeas. Rules which are every bit as broadly worded as the language found too vague here are routinely accepted in other circuits.

In attempting to determine whether California "regularly follows" its timeliness rule, the Ninth Circuit counted, as failures to follow, cases in which multiple procedural defaults were potentially applicable, and a default other than untimeliness was the basis of denial. This distortion of the "regularly followed" requirement has no basis in this Court's precedents or in the purpose or rationale of the requirement.

ARGUMENT

I. The decision below will impose a massive burden of unnecessary litigation on California.

A. Magnitude of the Problem.

Federal courts hearing habeas corpus cases should "accord[ ] fitting respect to the State's procedural rules, which are indispensable to the administration of its criminal justice system." *Lambrix* v. *Singletary*, 520 U. S. ___ (No. 96-5658, May 12, 1997) (slip op., at 1) (O'Connor, J., dissenting). It would be difficult to conceive of a greater violation of this principle than the Ninth Circuit's cavalier brushing aside of *all* of California's procedural rules. The consequences of this error are staggering, and they call for this Court's intervention.

In a line of cases beginning with *Siripongs* v. *Calderon*, 35 F. 3d 1308 (CA9 1994) and continuing to the present case, the Ninth Circuit has disregarded, as "inadequate," all of California's procedural default rules applied to cases decided prior to

In re Clark, 5 Cal. 4th 750, 855 P. 2d 729 (1993).[2] See *Calderon* v. *U. S. District Court (Hayes)*, 103 F. 3d 72 (1996); *Calderon* v. *U. S. District Court (Bean)*, 96 F. 3d 1126 (1995), cert. denied, 520 U. S. ___ (No. 96-1355, April 28, 1997); *Morales* v. *Calderon*, 85 F. 3d 1387 (1995). As the Attorney General has pointed out, as many as 140 cases may be affected by this erroneous line of decisions. Pet. for Cert. 8, n. 1; see also California Department of Corrections, CDC Condemned Inmate List (Sentences Affirmed by the California Supreme Court) (April 1, 1997). Since many of these cases will involve numerous defaulted claims,[3] California will be forced to litigate the merits of thousands of claims that should otherwise be barred from federal court.

The principal harms that will result from the Ninth Circuit's decisions are the cost and delay of unnecessary litigation. Even if California prevails on every defaulted claim, the state still loses. Litigation is expensive. In the process of winning these claims, California will be forced to expend substantial resources. It is the litigation itself, and not its outcome, that will harm the state the most.

Furthermore, this unnecessary litigation will result in further delays in the administration of justice. Hayes' untimely claims, raised for the first time in federal court, have already resulted in a two-year delay as Hayes exhausted his state remedies. That two-year delay will be further increased by the time and effort required to litigate Hayes' defaulted claims. California is doomed to repeatedly suffer this unnecessary delay as the 140 pre-*Clark* capital cases now pending in the state pass through federal habeas.

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2. The Ninth Circuit has not yet considered whether California's procedural rules are adequate when applied to cases arising after *Clark* was decided. See *Morales* v. *Calderon*, 85 F. 3d 1387, 1391 (CA9 1996).

3. An average of 30 claims per case were defaulted in the line of cases on this issue. See *Siripongs*, 35 F. 3d, at 1316 (3 claims); *Morales*, 85 F. 3d, at 1388-1389 (36 claims); *Bean*, 96 F. 3d, at 1128 (49 claims); *Hayes*, 103 F. 3d, at 74 (32 claims).

B. Default and Timeliness.

The principal procedural rule at issue in the present case is California's rule on untimely habeas petitions.[4] However, in disregarding this rule as inadequate, the Ninth Circuit has failed to consider the unique nature of timeliness rules as well as the individual facts of the cases before it. It also failed to recognize the importance of the California Supreme Court Policies in cases of delayed petitions. As a result, hundreds of untimely, defaulted claims will have to be litigated in federal court.

Both federal and state courts recognize the necessity of creating procedural rules to govern the proper resolution of claims. Most procedural rules are based on concerns with the timely presentation of claims in the appropriate forum. In the context of habeas corpus litigation, such rules are necessary because the existence of "habeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh." *McCleskey* v. *Zant*, 499 U. S. 467, 491-492 (1991). The specific rules that have developed serve to limit both delay and the withholding of claims at various stages of a case.

The procedural rules that most often result in defaults are devised to encourage the timely presentation of claims. At trial, failure to comply with a contemporaneous objection rule can result in the loss of a claim. See Fed. Rule Evid. 103(a); Cal. Evid. Code § 353. This rule allows the trial judge, in the best position to consider the claim, an opportunity to rule on the issue. Another common rule bars claims from collateral review that should have been presented on appeal. See *United States* v. *Frady*, 456 U. S. 152, 165 (1982); *In re Dixon*, 41 Cal. 2d 756, 759, 264 P. 2d 513, 514 (1953). Similarly, claims pre-

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4. Out of the 44 claims brought by Hayes in his second state habeas petition, 32 were barred as untimely. Furthermore, undue delay was the principal procedural default in both *Morales* v. *Calderon*, 85 F. 3d, at 1388-1389 and *Calderon* v. *U. S. District Court (Bean)*, 96 F. 3d, at 1128.

sented for the first time in a second or subsequent habeas petition may be defaulted. See *McCleskey*, *supra*, 499 U. S., at 470 ("abuse of the writ"); *In re Clark*, 5 Cal. 4th 750, 767-768, 855 P. 2d 729, 740 (1993) ("piecemeal presentation of claims"). These two rules limit repetitive habeas petitions and encourage presentation of claims at the earliest possible time in the litigation. Finally, claims that are not raised in a generally timely manner are subject to default. See 28 U. S. C. § 2254 Rule 9(a); *Lonchar* v. *Thomas*, 134 L. Ed. 2d 440, 453, 116 S. Ct. 1293, 1300 (1996); *In re Clark*, 5 Cal. 4th, at 765, 855 P. 2d, at 738. Timeliness rules serve a purpose similar to statutes of limitations by guarding against the presentation of stale claims.

Of these procedural rules, general timeliness rules are unique in their application. The other rules are typically triggered by a discrete event. For example, default for failure to comply with a contemporaneous objection rule occurs only at a specific point during a trial. Similarly, omitted claims on appeal are defaulted when issues are briefed or "assignments of error" made. In contrast, a default under a timeliness rule such as 28 U. S. C. § 2254 Rule 9(a) is a continuing default. A claim is untimely if not made within a reasonable time, and it gets more untimely every day until it is finally asserted.

C. California's Timeliness Rules.

California has long-standing timeliness rules that pre-date all aspects of Hayes' case, as the Attorney General has set forth. Pet. for Cert. 10. On the other hand, the Ninth Circuit has taken the position that California, at least prior to *In re Clark*, had no clear timeliness rules for habeas petitions. See *Calderon* v. *U. S. District Court (Hayes)*, 103 F. 3d 72, 74-75 (1996). While supporting the position of the Attorney General, *amicus* submits that June 6, 1989, stands as the absolute *latest* date in which California's timeliness rules could be considered firmly established. On that date, the California Supreme Court announced its Supreme Court Policies Regarding Cases Arising from Judgments of Death, West's Cal. Codes, 3 Court Rules

143-146 (1996) ("Policies"). The Policies included specific timeliness standards for habeas petitions. *Id.*, at 143-144.

The general rule is that a petition should be filed "without substantial delay." There are three independent means of qualifying under this rule. First, a petition can be filed within 90 days after the brief on appeal. *Id.*, Standard 1-1.1, at p. 144. Second, a petition may be filed within a reasonable time after petitioner or counsel knew or should have known of the factual or legal basis. *Id.*, Standard 1-1.2. This is the criterion established in pre-Policies case law. See *In re Stankewitz*, 40 Cal. 3d 391, 396-397, n. 1, 708 P. 2d 1260, 1262, n. 1 (1985). Third, for cases arising prior to *Stankewitz*, the petition may be filed within a reasonable time after the date of that decision. *Id.*, Standard 1-1.3.

The Policies further provided for investigation of "potentially meritorious grounds for relief," *id.*, Standard 1-1, and compensation of counsel for that effort. *Id.*, Standard 2-2. *In re Clark*, 5 Cal. 4th, at 785, 855 P. 2d, at 752, recognized that prior to the Policies there was no duty of investigation on appellate counsel and indicated that "claims that were discovered only as a result of investigation commenced promptly after June 6, 1989, the date on which the Policies became effective, will be deemed timely if presented promptly after counsel became aware of them."

The Fourth Circuit noted in *O'Dell* v. *Netherland*, 95 F. 3d 1214, 1241 (1996), cert. granted on other grounds, No. 96-6867, "As a general matter, whenever a procedural rule is derived from state statutes and supreme court rules . . . the rule is necessarily 'firmly established.' " There is no material difference between supreme court rules and the Policies for this purpose. The Policies thus firmly establish the rule, assuming *arguendo* it was not previously established, they apply to preexisting claims, and they reasonably accommodate any reliance on prior uncertainty in the law. Whatever debate there may be about earlier law, on June 6, 1989, California's timeliness rule was firmly established.

D. New Timeliness Rules and Pending Cases.

Obviously, it would be unfair to apply a new procedural default rule, like a contemporaneous objection rule, to bar a claim when the petitioner's only opportunity to comply with the rule occurred before the rule existed. See *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991). Such an application would be retroactive and raise due process concerns. The same fairness concerns are not present when general timeliness rules are applied to claims pending when the rules are announced, so long as the petitioner has a reasonable opportunity to comply with the new rules. It is not unfair to ask a petitioner to assert claims in a timely manner from a specific point in time forward. Conversely, it would be unfair to the state to allow a petitioner whose claim arose prior to a particular timeliness rule to ignore the rule and continually delay asserting the claim.

Timeliness rules are analogous in practice to statutes of limitations and, therefore, should apply to pending cases in the same manner. Federal law recognizes that changes to statutes of limitations may apply to preexisting claims. See *Sohn* v. *Waterson*, 17 Wall. 596, 600 (1873); *Reyes* v. *Keane*, 90 F. 3d 676, 679 (CA2 1996). The only restraint on applying a shorter period of limitations to pending cases is that a reasonable time to comply with the new statute must be allowed. See *Texaco, Inc.* v. *Short*, 454 U. S. 516, 527, n. 21 (1982). California follows a similar rule. *Aronson* v. *Superior Court*, 191 Cal. App. 3d 294, 297, 236 Cal. Rptr. 347, 349 (1987). A claimant who fails to raise his claims within a reasonable time after the promulgation of the rule has no basis for complaint regarding its application to his case.

E. Hayes' Default.

In the present case, the Ninth Circuit indicated that Hayes' default occurred in 1987, when he "filed his first state habeas petition and failed to raise all of his claims." *Calderon* v. *U. S. District Court (Hayes)*, 103 F. 3d 72, 75 (1996). This statement is correct as to the successive petition rule but simply ignores

the timeliness rule. The latter rule involves a continuing default. In 1989 at the very latest, Hayes was placed on notice that timely habeas petitions were required by the California Supreme Court and that any substantial delay must be justified by "good cause." Since Hayes continued to delay after receiving such notice, the California Supreme Court properly determined his claims were defaulted.

The chart in the Appendix shows the significant events that occurred during the pendency of Hayes' case.

A review of this chronology reveals several instances of substantial delay by Hayes which occurred after the Policies were announced. First, Hayes waited almost *five years* after the announcement of the Policies to finally assert his delayed claims. At the time the Policies were announced, Hayes' appeal was still pending and he was represented by counsel. Moreover, Hayes had already filed a habeas petition that had been denied by the California Supreme Court only 19 days before. Nevertheless, Hayes made no attempt to comply with the timeliness rules that the California Supreme Court expressly indicated applied to all pending cases.

Another instance of delay is shown by the period between Hayes' first habeas petition in federal court and his second state habeas petition. At the time Hayes filed his federal habeas petition, June 22, 1993, it contained 44 claims which had not yet been presented to California courts. Although Hayes was clearly aware of all the factual and legal bases for these claims on that date, he waited an additional ten months to file those claims in state court.

Finally, Hayes waited nearly nine months after the California Supreme Court's decision in *In re Clark* to assert his delayed claims in state court. Any one of the above delays is sufficient to deny Hayes' defaulted claims.

Between the announcement of the Policies, June 6, 1989, and *In re Clark*, July 29, 1993, the California Supreme Court affirmed 92 death sentences on appeal. See California Department of Corrections, CDC Condemned Inmate List (Sentences

Affirmed by the California Supreme Court) (April 1, 1997). As these cases enter federal habeas, the need to exhaust state remedies will undoubtedly result in the filing of hundreds of untimely claims in the California Supreme Court. Most of these claims will be held to be defaulted in violation of the timeliness standards in the Policies. Under the rationale of the present case, however, federal courts will refuse to acknowledge the adequacy of such defaults, regardless of the length of the delay. As a result, California will have to expend significant resources in unnecessary litigation.

Capital punishment creates inherent incentives for delay. So long as a habeas court stays a petitioner's execution, the death sentence is frustrated. This delay imposes a significant cost to the state, especially in capital litigation, because it robs our criminal justice system of the finality necessary to give law its deterrent effect. See *McCleskey* v. *Zant*, 499 U. S. 467, 491 (1991). In the present case, the Ninth Circuit has failed to recognize the significant cost to California of delay and the state's interest in enforcement of its timeliness rules. As a result, the Ninth Circuit has excused undue delay in this case and others, and will continue to do so in future cases. Certiorari should be granted to prevent further harm to California's interests.

II. The courts of appeals are in conflict over established state rules with broadly defined criteria or exceptions.

A state procedural rule must be "adequate" to bar a claim from federal habeas. The standard for adequacy is usually stated as a requirement that the state rule be "firmly established and regularly followed . . . ." *James* v. *Kentucky*, 466 U. S. 341, 348-349 (1984). This standard has presented little difficulty when the very existence of the rule at the time of the default is so unclear that "petitioner could not fairly be deemed to have been apprised of [the rule's] existence." *NAACP* v. *Alabama* (*Patterson*), 357 U. S. 449, 457 (1958). Most, if not all, of this court's cases holding state bars inadequate fall into this cate-

gory. See, *e.g.*, *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991) (retroactive application of new rule); *Johnson* v. *Mississippi*, 486 U. S. 578, 587 (1988) (state supreme court precedent contrary to later-asserted rule).

When the focus of the habeas petitioner's attack is not on the existence of the rule or its applicability to the case, but rather on its definiteness or the granting of exceptions, the law is much less clear. *Dugger* v. *Adams*, 489 U. S. 401 (1989) is typical of these cases. The state procedural bar was assailed as "inadequate" because "the Florida Supreme Court . . . has addressed the merits in several cases raising [the same claim] on postconviction review." *Id.*, at 411, n. 6. Unfortunately, the *Adams* Court relegated its rejection of this contention to a footnote and provided little guidance for lower courts.

Procedural default rules very often have exceptions defined in general terms. For example, Rule 30 of the Federal Rules of Criminal Procedure establishes a procedural default rule for jury instructions. Rule 52(b) then creates an exception for "[p]lain errors . . . affecting substantial rights . . . ." The wording of this rule has not changed since 1944, yet its contours are still being defined. See *United States* v. *Olano*, 507 U. S. 725, 732 (1993); *Johnson* v. *United States*, 520 U. S. ___ (No. 96-203, May 12, 1997) (slip op., at 3) (circuit conflict on meaning of "substantial rights"). Broad terms such as "plain" and "substantial" acquire concrete meaning only through the accretion of case law. In federal habeas law, broad statutory phrases such as "ends of justice" and "abused the writ," 28 U. S. C. § 2244(a), (b), have similarly evolved through case law. See, *e.g.*, *Sanders* v. *United States*, 373 U. S. 1, 18 (1963) (deliberate withholding); *McCleskey* v. *Zant*, 499 U. S. 467, 493 (1991) (cause and prejudice).

Not surprisingly, many states have faced similar situations with regard to their procedural default rules. Rules established by statute, rule of court, or case law frequently have broadly worded exceptions which have been made more concrete through recent case law, just like the federal rules. The "ade-

quacy" of such rules as procedural defaults, when the defaulted claims are presented in federal habeas, varies radically between circuits.

The Ninth Circuit's holding in the present case rests on *Calderon* v. *U. S. District Court* (*Bean*), 96 F. 3d 1126, 1130 (CA9 1996), which in turn rests on *Morales* v. *Calderon*, 85 F. 3d 1387 (CA9 1996). See *Calderon* v. *U. S. District Court* (*Hayes*), 103 F. 3d 72, 74 (CA9 1996). *Morales* denied preclusive effect to defaults occurring between the promulgation of the Policies and the decision in *In re Clark*, 5 Cal. 4th 750, 855 P. 2d 729 (1993) based on three premises. First, *Morales* asserted that the Policies were "uncertain" because they did not define "substantial" delay or criteria for determining "good cause." *Morales*, 85 F. 3d, at 1391. Second, the California Supreme Court in *Clark* had acknowledged the lack of clear criteria for *departure* from the rules, not the rules themselves. The third ground, based on the number of delayed petitions denied on other grounds, will be addressed in part III, below.

The Ninth Circuit's treatment of the "vagueness" of the state rule forms a sharp contrast with the treatment in other circuits. While paying lip service to the value of discretion in the application of rules, the Ninth Circuit demands "standards that, at least over time, can become known and understood within reasonable operating limits." *Morales*, 85 F. 3d, at 1392. In other words, unless the state rule is sufficiently structured that the Ninth Circuit can look over the state's shoulder and see if it is applying its own rule correctly, the rule is "inadequate." From the mere fact that the Ninth Circuit has no way of knowing whether the California Supreme Court is exercising its discretion in a principled manner, *ibid.*, the state rule is tossed out.[5]

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5. This statement could also be interpreted as an assertion that the state has the burden of proving the adequacy of its rule, a point briefed by the Attorney General. See Pet. for Cert. 20-21.

Flexible state rules meet with a very different fate in other circuits. In *Prihoda* v. *McCaughtry*, 910 F. 2d 1379, 1381 (CA7 1990), the state rule permitted exceptions for "sufficient reason." This would surely have failed the Ninth Circuit's *Morales* test, but the Seventh Circuit held that the inevitable uncertainty in application was not enough to defeat the rule's adequacy. *Id.*, at 1385. In *Duvall* v. *Purkett*, 15 F. 3d 745, 747 (1994), the Eighth Circuit had no problem with a state rule creating an exception for "manifest injustice," noting that it was similar to rules applicable in federal courts. The Tenth Circuit in *Andrews* v. *Deland*, 943 F. 2d 1162, 1190 (1991) and the Fifth Circuit in *Amos* v. *Scott*, 61 F. 3d 333, 342 (1995) have held that "an occasional act of grace" does not disqualify a state rule. Neither circuit held that the state must establish "reasonable operating limits" for the dispensation of grace that the Ninth Circuit would require.

Throughout the country, states are in the process of reshaping their procedural default rules. The reshaping may be in the form of case law, as in California under *Clark*, or by legislation. See, *e.g.*, Tex. Code Crim. Proc. Ann., Art. 11.071, § 5 (Vernon's Supp. 1997). In formulating these rules, state courts and legislatures need to know how much latitude for "occasional acts of grace" can be allowed before a state rule will be rendered a virtual nullity and every barred claim will have to be litigated in federal court. The split between the Ninth Circuit and the other circuits leaves that question up in the air.

III. The Ninth Circuit's strained interpretation of the requirement that a procedural default rule be regularly followed calls for this Court's intervention.

The third reason given to justify the result in *Morales* v. *Calderon*, 85 F. 3d 1387 (CA9 1996) was this: "Morales asserts that at the time his case was litigated in the district court, the California Supreme Court had *denied* 35 habeas petitions filed three years or more after affirmance on direct appeal, and

more than half of those denials had not been on grounds of untimeliness." *Id.*, at 1391 (emphasis added).

On its face, this statistic is utterly insufficient to prove that California's timeliness rule is not regularly followed. For example, two of the cases urged to support this proposition were the third habeas petitions of James Karis and James Odle. Brief for Appellant in *Morales* v. *Calderon*, Ninth Circuit No. 94-99010, at 26-27, n. 23. Karis' third petition was denied as successive. See *Karis* v. *Vasquez*, 828 F. Supp. 1449 (ED Cal. 1993). Odle's third petition was denied both on the merits and on procedural grounds. See *Odle* v. *Calderon*, 884 F. Supp. 1404, 1412-1413 (ND Cal. 1995).[6]

By relying on such cases to advance the proposition that California applies its rules "at random," see *Morales*, 85 F. 3d, at 1392, the Ninth Circuit implicitly endorses the staggering assertion that reliance on one procedural default to deny a petition constitutes a failure to observe any other default rule that may apply. To prevent a case from being used in this manner, a state court would have to go through each potentially applicable reason for denying the petition, even though one is sufficient.

This Court has never endorsed such a pointless waste of judicial resources. On the contrary, this Court has repeatedly said that when a habeas petitioner must clear multiple hurdles, a court may stop when it determines he cannot clear one of them. See, *e.g.*, *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984) (if no prejudice, need not resolve ineffectiveness issue). "Judicial economy might counsel giving the *Teague* question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural bar issue involved complicated issues of state law." *Lambrix* v. *Singletary*, 520 U. S. ___ (No. 96-5658, May 12, 1997) (slip op., at 6); *id.* (slip

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6. We cite these two cases as examples because the basis of denial in each is described in a later published opinion and thus readily available to this Court. There are other, similar cases which are not published.

op., at 2) (O'Connor, J., dissenting). If such a course is appropriate for the federal courts, there is no sensible reason why state courts cannot do the same.

The notion that denial of a petition based on one rule constitutes a failure to "regularly apply" another is so strange that it does not appear to have even been considered in other circuits or in this Court. Therefore, *amicus* is unable to say there is a split in the circuits in the narrow sense. However, this jarring holding is such a sharp departure from the purpose and underlying rationale of the "adequacy" rule that the question should be settled by this Court. See Supreme Court Rule 10(c).

Looking back through this Court's cases in which state bars were found inadequate, we see a consistent pattern of rules which trap, deceive, or mislead the defendant into failing to assert his federal right at the time or in the manner which the state court later determines was the required time or the required manner. See, *e.g.*, *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991) (retroactive application of new procedural rule); *Johnson* v. *Mississippi*, 486 U. S. 578, 587-588 (1988) (state supreme court had expressly stated that collateral review, not sentencing and appeal, was proper forum for attacking priors); *NAACP* v. *Alabama* (*Flowers*), 377 U. S. 288, 297 (1964) (rule going only to form, not substance, applied with "pointless severity," unlike prior applications); *NAACP* v. *Alabama* (*Patterson*), 357 U. S. 449, 457 (1958) ("petitioner could not fairly be deemed to have been apprised of [the rule's] existence"). Justice Holmes captured the essence of the rule long ago. "Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, *when plainly and reasonably made*, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923) (emphasis added); see also *James* v. *Kentucky*, 466 U. S. 341, 349 (1984) (quoting *Davis*).

A state court's denial of a habeas petition under Rule A instead of Rule B, when either might have been invoked, does not set a "springe" for other petitioners who may be denied later

under Rule B. No rational person would interpret such a denial as questioning the existence of Rule B or as a green light to go ahead and disregard it. To invoke the "inadequate" state ground rule to permit claims which were *not* made within a reasonable time, by any stretch of the imagination, is a perversion of that rule.

The present case is, in a sense, the converse of *Patterson*, *Flowers*, *Johnson*, and *Ford*. In those cases, state courts adopted unforeseeable or hypertechnical interpretations of state rules to frustrate the assertion of federal rights. In the present case, the federal court had adopted a contorted interpretation of the federal habeas procedural default rule to defeat the plain and reasonable assertion of a compelling state interest: the requirement that a habeas petitioner make all his claims within a reasonable time.

This case thus presents an important federal question which has not been, but should be, decided by this Court, and a writ of certiorari is appropriate.

CONCLUSION

The petition for writ of certiorari should be granted.

May, 1997

Respectfully submitted,

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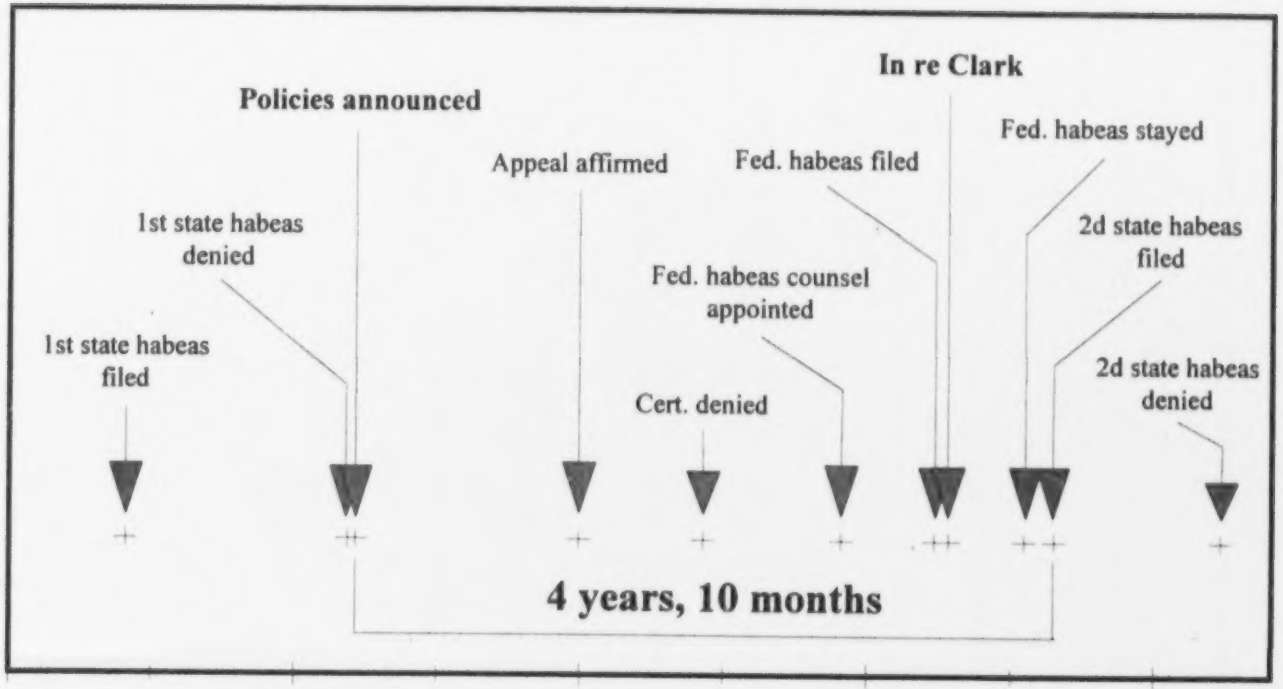
*Attorney of record

APPENDIX

CHRONOLOGY OF HAYES' CASE	
Oct. 29, 1987	*Hayes filed first state habeas petition*
May 18, 1989	*California Supreme Court denied Hayes' first habeas petition*
June 6, 1989	***California Supreme Court announced Supreme Court Policies Regarding Cases Arising from Judgments of Death***
Dec. 31, 1990	*California Supreme Court affirmed Hayes' conviction on appeal*
Nov. 12, 1991	*United States Supreme Court denied Hayes' petition for certiorari*
Oct. 27, 1992	*Counsel appointed for federal habeas*
June 22, 1993	*Hayes filed first federal habeas petition*
July 29, 1993	***California Supreme Court decided In re Clark and In re Harris***
Feb. 4, 1994	*Federal habeas stayed pending exhaustion of 44 claims in state court*
April 22, 1994	*Hayes filed second state habeas petition*
June 21, 1995	*California Supreme Court denied Hayes' second habeas petition*

See Pet. for Cert. 2-4.

Hayes Time Line



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ORIGINAL

No. 96-1755 (H)

Supreme Court, U.S.
FILED
MAY 28 1997
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

Arthur Calderon, Petitioner

v.

United States District Court,

Eastern District of California, Respondent

Blufford Hayes Jr., Real Party in Interest

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS FOR THE NINTH CIRCUIT

REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should restructure the procedural default doctrine so that a state court's arbitrary application of certain discretionary procedural rules may be deemed adequate and independent to bar federal habeas review.

REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION

Real party in interest Blufford Hayes Jr. (hereinafter "Hayes") respectfully requests that the Court deny the petition for writ of certiorari. Petitioner (hereinafter "State") seeks review of the Court of Appeals' denial of its petition for writ of mandamus, which thereby affirmed the district court's denial of the State's motion to dismiss, on procedural grounds, 32 extra-record habeas corpus claims raised by Hayes.

The opinion of the Court of Appeals denying the petition for writ of mandamus is reported at Calderon v. United States Dist. Court E. Dist. Cal., 103 F.3d 72 (9th Cir. 1996). The Findings and Recommendations of the magistrate judge, and the district court's order adopting these findings, are not reported, but are printed as Appendix C and D to the petition.

STATEMENT OF THE CASE

1. Nature of the Case.

This action involves a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 raising numerous federal constitutional challenges to the conviction and sentence of death

received by Hayes in the Superior Court of the State of California, County of San Joaquin, in 1982.

2. The Course of Proceedings.

Hayes has been sentenced to death following his conviction for one count of first degree murder, with the special circumstance of burglary.[1] Upon affirmance of the conviction and death sentence on direct appeal to the California Supreme Court [People v. Hayes, 802 P.2d 376 (Cal. Sup. Ct. 1990)], Hayes filed a petition for writ of habeas corpus consisting of 61 claims in the United States District Court for the Eastern District of California. Twenty-three of these claims previously were raised in the California Supreme Court during Hayes' automatic appeal or during a first petition for writ of habeas corpus which was decided **prior** to the direct appeal.

The district court dismissed the 38 unexhausted claims, without prejudice, and ordered Hayes to present the claims to the California Supreme Court. Six weeks later, Hayes filed these claims, and five additional claims, in a second petition for writ

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[1] A jury finding of robbery-murder special circumstance was reversed by the California Supreme Court on direct appeal. People v. Hayes, 802 P.2d 376 (Cal. Sup. Ct. 1990).

of habeas corpus in the California Supreme Court.

The California Supreme Court denied Hayes all relief, issuing an order which stated, inter alia:

> All claims are denied on the merits, except claims 3, 6, and 10. In addition, all claims are denied as untimely, except claims 1, 3, 4, 7, 26.5, 31, 32, 40, 41, 42, and 43. (See In re Clark, (1994) (sic) 5 Cal.4th 750, 797; In re Swain (1949) 34 Cal.2d 300, 304.) . . . Claims 6, 8, and 39 are denied on the ground that they could have been, but were not, raised on direct appeal. (In re Dixon (1953) 41 Cal.2d 756.) . . .

Petition for Writ of Certiorari, Appendix B.[2]

Hayes then filed a first amended petition in the district court, which included these 43 newly-exhausted claims. The State moved to dismiss 32 of these claims on the grounds that

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[2] Justice Mosk was "of the opinion the petition should be denied only on the merits."

they were denied by the California Supreme Court on procedural grounds, i.e., as untimely or on the grounds that they could have been raised on direct appeal, thereby barring further federal court review of the claims. On January 22, 1996, the magistrate judge filed his findings and recommendations that the motion should be denied. Petition for Writ of Certiorari, Appendix C. The State filed objections to the findings and recommendations to the district court judge. Notwithstanding these objections, on April 10, 1996, the district court judge filed an order adopting the magistrate judge's findings and recommendations to deny the motion to dismiss. Petition for Writ of Certiorari, Appendix D.

On September 6, 1996, the State filed a petition for writ of mandamus in the Court of Appeals for the Ninth Circuit seeking an order reversing the district court. The Court of Appeals denied the petition. Calderon v. United States Dist. Court E. Dist. Cal., 103 F.3d 72 (9th Cir. 1996).

3. Disposition in the Court Below.

On December 20, 1996, the Court of Appeals for the Ninth Circuit denied the State's petition for writ of mandamus on the grounds that the order of the district court denying the State's motion to dismiss was not clearly erroneous as a matter

of law. The court reasoned that the district court's order holding that the California state rules regarding: (1) the timely filing of habeas corpus petitions in cases arising from judgments of death; and (2) the obligation to raise a claim on direct appeal, were not adequate and independent to bar federal review of constitutional claims.

With respect to the state timeliness policy, the Court of Appeals noted the concession by the California Supreme Court that "'no clear guidelines have emerged in our past cases'" (Calderon v. United States Dist. Court E. Dist. Cal., 103 F.3d 72, 74 (9th Cir. 1996)(quoting In re Clark, 855 P.2d 729, 737 (Cal. Sup. Ct. 1993))), and added that the State's arguments previously have been rejected because California's rule on timeliness was not "'clear, consistently applied, and well-established'", and therefore could not "serve as an adequate and independent state ground sufficient to support a procedural default." Id. at 74-75(quoting Morales v. Calderon, 85 F.3d 1387, 1393 (9th Cir.), cert. denied, __ U.S. __, 117 S. Ct. 500 (1996).

With respect to the rule obligating the petitioner to raise a claim on direct appeal, the Court of Appeals noted the "lack of consensus on the adequacy of the [state rule][] in

foreclosing federal review of state court decisions," and that it could not "say that the district court clearly erred in determining" whether it had been consistently applied. Id. at 75.

On March 19, 1997, the State filed a petition for writ of certiorari, which was placed on this Court's docket on May 2, 1997, seeking review of the decision of the Court of Appeals.

I

THE PETITION NEITHER RAISES AN IMPORTANT QUESTION OF FEDERAL LAW NOR IDENTIFIES A CONFLICT IN THE COURTS BELOW

This petition for writ of certiorari does not involve an important question of federal law which must be resolved by this Court. The State fails to articulate any reason why the Court should depart from the well established precedent that a state procedural rule that is unclear and inconsistently applied lacks due process as an adequate and independent state ground for upholding a judgment. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); Jordan v. De George, 341 U.S. 223, 231-32 (1951); County Court of Ulster County v. Allen, 442 U.S. 140, 150

(1979); Ford v. Georgia, 498 U.S. 411, 422-24 (1991); Calderon v. United States Dist. Court E. Dist. Cal., 96 F.3d 1126 (9th Cir. 1996), cert. denied, __ U.S. __, 137 L. Ed. 2d 714 (1997); Morales v. Calderon, 85 F.3d 1387, 1393 (9th Cir.), cert. denied, __ U.S. __, 117 S. Ct. 500 (1996); Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1175 (1995).

California's habeas corpus timeliness rule and its rule requiring the presentation of claims during direct appeal (hereinafter "Dixon" or "Dixon rule") cannot be equated with the clear and objective rules that have been upheld as adequate and independent. Compare In re Clark, 855 P.2d 729, 759 n.30 (Cal. Sup. Ct. 1993)(state rules regarding timeliness "cannot fairly be analogized to a statute of limitations") with Coleman v. Thompson, 501 U.S. 722 (1991)(strict time period for filing claims); and In re Harris, 855 P.2d 391, 396 (Cal. Sup. Ct. 1993) (acknowledging that previously discretionary "Dixon" rule only *now* is firmly established) with Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989)(claims not raised on direct appeal cannot be raised on post-conviction review). In this regard, no issue set forth in the petition remains unanswered by the Court, and no confusion has occurred with respect to the lower courts'

understanding and application of this adequacy test.

Moreover, there are no conflicts in the courts below with respect to this precedent. Remarkably absent from the State's analysis is that, consistent with the Court of Appeals' decision in this case, every federal circuit has stated in a habeas corpus proceeding that only those state rules that are consistently enforced are adequate to support a finding of procedural default. See Breest v. Perrin, 655 F.2d 1, 3 (1st Cir.), cert. denied, 454 U.S. 1059 (1981); Wedra v. LeFevre, 988 F.2d 334, 340 (2d Cir. 1993); Reynolds v. Ellingsworth, 843 F.2d 712, 719 (3d Cir.), cert. denied, 488 U.S. 960 (1988); Smith v. Dixon, 14 F.3d 956, 972 (4th Cir.), cert. denied, 513 U.S. 841 (1994); Hill v. Black, 932 F.2d 369, 373 (5th Cir. 1991); Warner v. United States, 975 F.2d 1207, 1213 (6th Cir. 1992), cert. denied, 507 U.S. 932 (1993); Rosa v. Peters, 36 F.3d 625, 633 (7th Cir. 1994); Grubbs v. Delo, 948 F.2d 1459, 1463 (8th Cir. 1991), cert. denied, 506 U.S. 835 (1992); Morales v. Calderon, 85 F.3d 1387, 1390 (9th Cir.), cert. denied, ___ U.S. ___, 117 S. Ct. 500 (1996); Klein v. Neal, 45 F.3d 1395, 1398 (10th Cir. 1995); Cochran v. Herring, 43 F.3d 1404, 1408 (11th Cir. 1995). No circuit ever has rejected consistency of application as a test of adequacy. For these reasons, the petition should be denied.

II

THE FACIAL INDETERMINACY OF THE STATE COURT HABEAS PROCEDURAL RULES RENDERS THEM INADEQUATE TO BAR FEDERAL REVIEW

The State's petition is premised upon numerous misconceptions of the law and its disdain for established legal precedent. The State contends that the state court's reference to In re Clark, 855 P.2d 729 (Cal. Sup. Ct. 1993) and In re Dixon, 264 P.2d 513 (Cal. Sup. Ct. 1953) when denying Hayes' habeas claims is "adequate" to support the state-court judgment within the meaning of Harris v. Reed, 489 U.S. 255 (1989), and attempts to shroud the concomitant forfeiture of federal constitutional rights in the garb of federalism. In so doing, the State fails to recognize that comity is not a proscription against federal court review. Due regard for the principles of federalism requires an inquiry into the adequacy and independence of state grounds that threaten to defeat federal jurisdiction. Without contesting the state's power to regulate state procedure, an asserted procedural default that involves only the subjective application of a wholly discretionary and inchoate standard, cannot defeat federal court review.

A. California's Timeliness Rules.

The State's petition is premised upon the misconception that California's "pre-Clark"[3] habeas timeliness rules provided Hayes with adequate notice of a then existing timeliness rule; to wit, that substantial delay in presenting claims must be explained. The State cites the Standards[4] and In re Stankewitz, 708 P.2d 1260 (Cal. Sup. Ct. 1986) in this regard, and concludes that this timeliness rule was "the" rule relied upon by the California Supreme Court when, citing Clark and In re Swain, 209 P.2d 793 (Cal. Sup. Ct. 1949), it found 32 separate claims to be "untimely".[5]

There is no evidence that the California Supreme Court

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[3] In re Clark, 855 P.2d 729 (Cal. Sup. Ct. 1993).

[4] Standards for Preparation and Filing of Habeas Corpus Petitioners Relating to Capital Cases and for Compensation of Counsel in Connection With Those Petitions, adopted June 6, 1989.

[5] In Allen v. Calderon, Case No. CIV-S-88-1123 DFL-JFM-P (E.D. Cal. 1994) (unpublished memorandum), the State conceded before the same district court judge as in this case that, under Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1175 (1995), a state court procedural default based upon Stankewitz cannot be used to bar federal review. ("Respondent concedes that the Ninth Circuit has found that . . . the Stankewitz and Horowitz rules [] are not independent and adequate state grounds barring federal courts from reviewing the claims on the merits." Id. at 2.) Speaking now from the other side of its mouth, the State takes the exact opposite position.

relied on Clark, the Standards, or Stankewitz for this proposition. Neither the Standards nor Stankewitz were even cited by the court, and while Clark was cited, and states that: "[o]ur decisions have consistently required that a petitioner explain and justify any substantial delay in presenting a claim" (Clark, 5 Cal. 4th **at 783** [855 P.2d at 750]), the California Supreme Court did not rely upon this proposition, instead citing page **797** [855 P.2d at 760] of its opinion.[6] In fact, the order provides very little guidance or insight as to the reasons for the purported default at all.[7]

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[6] Perhaps the court simply selected a pin point cite from the opinion arbitrarily, or even carelessly, as evidenced in its order here where the court misstates the date of the opinion in its citation as "1994", not 1993.

[7] The lack of explanation by the California Supreme Court principally is the result of its "postcard" denial approach to habeas. See Hunter v. Aispuro, 982 F.2d 344, 347 (9th Cir. 1992), cert. denied, 510 U.S. 887 (1993); Harris v. Superior Court, 500 F.2d 1124, 1125 (9th Cir. 1974) (en banc), cert. denied, 420 U.S. 973 (1975). As a result of this practice, the vast majority of habeas corpus proceedings decided by the California Supreme Court are denied by minute order.

In fiscal year 1991-1992, for example, the California Supreme Court disposed of 1,067 habeas corpus petitions, including 28 relating to death penalty cases. 1994 Annual Report of Judicial Council of California at 77, 81. During that same period, the court published only three opinions in habeas cases challenging convictions, all of which were in death penalty cases, and two of which constituted portions of the direct appeal opinions. See People v. Mayfield, 852 P.2d 331 (Cal. Sup. Ct. 1993), cert. denied, 512 U.S. 1253 (1994); People

While Clark reiterates the timeliness rule referred to by the State, it also sets forth new timeliness standards (see appendix to decision), and attempts to explain and provide uniform guidelines for *future* timely presentation of habeas claims "because no clear guidelines have emerged in our past cases . . . ." Clark, 855 P.2d at 737. Notwithstanding, the State clairvoyantly concludes that the sole basis for the state court's reference to Clark and its untimeliness finding was Hayes' failure to explain any delay in presenting his claims.[8]

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v. Payton, 839 P.2d 1035 (Cal. Sup. Ct. 1992), cert. denied, 510 U.S. 1040 (1994); In re Wilson, 838 P.2d 1222 (Cal. Sup. Ct. 1992), cert. denied, 507 U.S. 1006 (1993).

The minute order denials frequently contain a shorthand reference to various procedural policies, in the form of case citations such as In re Waltreus, 397 P.2d 1001, 1005 (Cal. Sup. Ct.) (issue raised and rejected on appeal), cert. denied, 382 U.S. 853 (1965); In re Dixon, 264 P.2d 513, 515 (Cal. Sup. Ct. 1953) (issue should have been raised on appeal); In re Miller, 112 P.2d 10 (Cal. Sup. Ct. 1941) (issue raised and rejected in prior habeas); In re Swain, 209 P.2d 793, 796 (Cal. Sup. Ct. 1949) (failure to justify delay in bringing petition); In re Stankewitz, 708 P.2d 1260 (Cal. Sup. Ct. 1986) (same), but almost never explain the application of the procedural policy to the procedural facts of the case.

This is attributable to the fact that the court has the power to issue a written opinion only after issuing an order to show cause, which turns the matter into a "cause" within the meaning of Cal. Const. art. VI, § 24. See People v. Pacini, 174 Cal. Rptr. 820, 824 (Cal. Ct. App. 1981).

[8] Hayes in fact provided the following explanation, inter alia, regarding the timing of raising the claims:

Premised upon the foregoing, the State erroneously concludes that Hayes had adequate notice of Clark sufficient to satisfy the notice requirements of Ford v. Georgia, 498 U.S. 411 (1991), i.e., that a state procedural bar must be in place at the time the default occurred to preclude federal review of federal constitutional issues. The purported default did not occur, however, when Clark was announced in July 1993, or when the petition was filed on April 23, 1994 in the California Supreme Court, but at a time prior to Clark, when Hayes purportedly

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> All of the claims set forth in the instant petition were timely raised when this petition was filed with this Court because: (1) the investigation of facts supporting the prima facie elements of the claims commenced within a reasonable amount of time after June 6, 1989, i.e., the date when petitioner became obligated under the standards to conduct an investigation of habeas corpus issues; (2) the discovery of facts supporting the prima facie elements of the claims occurred within a reasonable amount of time prior to the time that the petition was filed; and (3) any passage of time after the discovery of the facts and prior to the filing of the petition was to allow petitioner to complete his investigation on other known issues to enable him to prepare and file the most complete petition possible containing as many claims as became known to petitioner, in lieu of filing piecemeal claims in multiple petitions as the information supporting each claim was gathered.

Petition for Writ of Habeas Corpus at 226.

failed to raise the claims in a timely manner. Accordingly, neither Clark, nor its predecessor cases, nor Standards, constitutes a firmly established, regularly followed, state procedural bar in place at the time the default occurred to preclude federal review of federal constitutional issues.

1. California's Timeliness Rule Prior to Clark.

Ignoring all precedent, the State incorrectly argues that, prior to Clark, California had established, regularly followed timeliness rules. This is legally and factually wrong. Morales v. Calderon, 85 F.3d 1387, 1393 (9th Cir.)("the California Supreme Court's timeliness rule, . . . before its further elucidation in Clark, did not afford an adequate and independent state ground barring federal review . . . ."), cert. denied, __ U.S. __, 117 S. Ct. 500 (1996); Calderon v. United States Dist. Court E. Dist. Cal., 96 F.3d 1126, 1130 (9th Cir. 1996), cert. denied, __ U.S. __, 137 L. Ed. 2d 714 (1997).

While failing to even acknowledge these cases,[9] the

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[9] The State cites Morales only once in its petition, conceding that the Ninth Circuit, like all other circuit courts, requires the petitioner to prove that the state procedural rule is not adequate and independent. While completely ignoring the holding of the case, the State's reference to Morales negates its unsupported position that there is a split of authority with

State then incorrectly claims that Hayes failed to present "empirical" evidence to support the analysis of the Court of Appeals and the district court. Hayes in fact submitted such evidence, which was not rebutted by the State, to the district court in response to the State's objections to the magistrate judge's findings and recommendations.[10] The State's failure to

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respect to that particular issue among the circuit courts.

[10] In this regard, Hayes set forth numerous examples of the state court excusing extraordinary delay while penalizing relative diligence. For instance, Robert Alton Harris' third and penultimate state-court petition for writ of habeas corpus, filed over 11 years post-affirmance, nearly three years after the Standards were in effect, and only five days before his execution, was denied "on the merits," an express rejection of untimeliness. In re (Robert) Harris, No. S026177 (Cal. Apr. 17, 1992)(minute order). There are numerous other striking examples. See, e.g., In re Ghent, No. S031473 (Cal. Feb. 23, 1994)(minute order)(successive habeas petition, filed almost four years after release of Standards and 5½ years after affirmance); In re Heishman, No. S033487 (Cal. Aug. 11, 1993)(minute order)(fourth habeas petition, filed four years after release of Standards and over five years after affirmance); In re Silva, No. S033635 (Cal. July 28, 1993)(minute order)(second habeas petition, filed over four years after release of Standards and over five years after affirmance).

Not merely anecdotal, these examples provide a perspective into a broader problem. Comparing Hayes' case to all other cases involving similar post-affirmance delays (filed after the Standards took effect) yields startling results. At the time Hayes filed his petition in state court, the California Supreme Court had denied 36 post-affirmance petitions involving post-affirmance delays of three years or more (filed after the Standards took effect). More than 50 percent (19) of those cases were denied without any imposition of the timeliness policies. (Case names, numbers, petitions, and the length of passage of

time were all set forth by Hayes). In an additional 28 percent (10) of the cases, at least some of the claims were denied on grounds other than untimeliness. (Case names, numbers, petitions, dispositions, and the length of passage of time were all set forth by Hayes). Only 19 percent (7) of the cases were denied entirely on timeliness grounds.

The statistical analysis should not, and did not, stop there, however, because of the theoretical possibility that the group of all post-affirmance petitions with at least 3 years of post-affirmance delay (filed after the Standards took effect) was too heterogenous a sample for a meaningful single-group analysis. Such a wide grouping could under certain circumstances fail to account for trends within the group. For instance, some measure of evenhandedness could be seen in the existence of a steady increase over time in the percentage of cases held untimely. The aberrant case examples provided should have dispelled any notion of an adequate correlation between the amount of post-affirmance delay and the likelihood of the imposition of a timeliness bar. A more rigorous approach to this question was made, however, by examining the mean and median affirmance-to-filing time span for each subcategory of the group (cases deemed timely, deemed untimely, and deemed timely in part).

The mean affirmance-to-filing time span in the cases deemed timely was 4 years, 6 months; the mean affirmance-to-filing time span in the cases deemed untimely in whole or in part was the same: 4 years, 6 months. The median affirmance-to-filing time span in the cases deemed timely was 3 years, 8 months; the median affirmance-to-filing time span in the cases deemed timely in part and untimely in part was 4 years, 0 months; and the median affirmance-to-filing time span in the cases deemed untimely in their entirety was 3 years, 7 months. Thus, the median affirmance-to-filing time span for the petitions denied as untimely in toto was **less than** the median time span for the cases considered timely in whole or in part. Thus, it was clear that as to these parameters of delay, both the intra-group and the inter-group application of the timeliness rules lacked evenhandedness.

The foregoing empirical observation did not merely reveal minor aberrations from a general trend which could be equated with occasional acts of judicial grace. The empirical data showed quite the contrary; if the vague and seemingly

address this evidence is consistent with its previous disposition of such evidence. See Morales v. Calderon, 85 F.3d 1387, 1391 (9th Cir.)("The State does not dispute these figures . . ."), cert. denied, __ U.S. __, 117 S. Ct. 500 (1996). In this regard, the State's position is wholly unsupported by the record here, its prior conduct, and Ninth Circuit case law.

2. Timeliness Under Clark.

In July 1993, the California Supreme Court conceded the vague and arbitrary application of the its timeliness rule. In re Clark, 855 P.2d 729 (Cal. Sup. Ct. 1993). The Clark court's review of the "law governing collateral attacks on judgments of conviction by petition for writ of habeas corpus" led the court to a simple, but important, conclusion: "no clear guidelines have emerged in our past cases." Id. at 737(emphasis added).

The state court announced substantial revisions to the Standards in July 1993, reprinted as an appendix to the Clark opinion. Id. at 771.[11] Inasmuch as Hayes' defaulted claims were

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flexible policy was indeed a rule, it is honored primarily in the breach.

[11] In addition, the opinion also addressed some of the Standards' most quixotic provisions. For instance, the court gave an example of what might constitute "good cause . . .

investigated, drafted, and filed in the district court on June 22, 1993, i.e., before the Clark decision was rendered, any purported timeliness default had to occur prior to Clark, and Clark (and the amended Standards) ordinarily would be irrelevant to Hayes' case.

This, however, is not the case. Clark acknowledges, consistent with the Court of Appeals' decision here, that prior law contained no clear timeliness requirements. Moreover, the state court's citation to Clark in denying Hayes' claims as untimely, establishes that Hayes' state-court claims were denied on procedural grounds not in existence at the time the purported default occurred.

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showing particular circumstances sufficient to justify substantial delay," id. at 771: petitioner having good reason to believe that other meritorious claims exist and delaying the presentation of known claims in order to avoid piecemeal litigation. The court also provided an important example of what was not good cause: "the assertion of counsel that he or she did not represent the petitioner earlier." Id. at 738 (footnote omitted). The opinion attempted to define the conditions under which a petition failing to demonstrate the absence of substantial delay and the existence of good cause for substantial delay will nonetheless be considered. Id.

3. The State's Misinterpretation of Clark.

In In re Clark, 855 P.2d 729 (Cal. Sup. Ct. 1993), the California Supreme Court acknowledged that with respect to timeliness "no clear guidelines have emerged in our past cases." Id. at 737. The State contends that this statement is irrelevant because it appears in a section of the opinion entitled "Repetitious and piecemeal claims," not in the section entitled "delay."

Initially, it should be noted that the "no clear guidelines" statement appears in a section of the Clark opinion entitled "LIMITATIONS ON HABEAS CORPUS RELIEF" and applies to all state court policies regarding habeas corpus. Moreover, the invalidity of the State's distinction is readily apparent. Although Clark involved potential violations of two state-court habeas corpus policies - the policy against delayed claims and the policy against piecemeal claims, see In re Stankewitz, 708 P.2d 1260 (Cal. Sup. Ct. 1986); In re Horowitz, 203 P.2d 513, 521-22 (Cal. Sup. Ct. 1949); cf. Rules Governing Section 2254 Proceedings in the U.S. District Courts, Rules 9(a) & (b) - delay is inherent in the piecemeal presentation of claims for habeas corpus relief. Indeed, Clark explicitly recognizes that questions of delay and piecemeal presentation are inextricably

bound. See In re Clark, 855 P.2d at 738. Thus, Clark's observations concerning the uncertain legal status of repetitious and piecemeal claims applies to delayed claims a fortiori. Put bluntly, the State's assertion that the California Supreme Court possesses greater latitude to "forgive" the potential violation of two procedural policies than of one, is absurd. There is no sensible reason why inconsistent enforcement of successor petition rules should be prohibited, while inconsistent enforcement of delay rules should be allowed.

Moreover, Clark's assertion, on which the State places great emphasis, that "'[o]ur decisions have consistently required that a petitioner explain and justify any substantial delay in presenting a claim,'" (quoting In re Clark, 855 P.2d at 750), simply begs the question; the decisions never have explained how much delay is substantial or what circumstances constituted adequate justification.

Perhaps understanding that neither the Standards nor case law assisted Hayes in understanding his specific timeliness obligations, the State leans heavily on an aspect of the timeliness rule that was clear: some explanation should have been given. The failure to explain, according to the State, was the "clear" reason why the petition was denied. Hayes, however, did

provide such an explanation. It is therefore impossible for the California Supreme Court to have found the petition untimely on this basis.

4. The Order is Inadequate Under Ford v. Georgia.

Notwithstanding a high degree of ambiguity in the state court's order denying Hayes' application for habeas corpus relief, the court's abstract meaning is relatively plain - someone acting on Hayes' behalf should have done something sooner. In doing so, the court cited In re Clark, 5 Cal. 4th 750, 797 [855 P.2d 729, 760], a decision rendered on July 29, 1993.

The Court has held that a procedural rule invoked by the state does not "even remotely" satisfy the requirement of adequacy and independence unless it was not only "regularly followed" but also "firmly established" by the time at which it is to be applied. Ford v. Georgia, 498 U.S. 411, 424 (1991). In Ford, the state procedural rule was inadequate to foreclose federal court review of a claim of error under Batson v. Kentucky, 476 U.S. 79 (1986), because the rule was not announced until "after petitioner in this case filed his motion on the prosecution's use of peremptory challenges and long after

petitioner's trial was over." Ford, 498 U.S. at 424. "In any given case, however, the sufficiency of such a rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure." Id. at 423. "'Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.'" Id. at 423 (quoting NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958)).

As in Ford, the California Supreme Court's retroactive application of the timeliness rule announced in Clark raises questions of foreseeability and fairness. In this case, the state court applied Clark retroactively because, at the time Hayes should have raised the claims under Clark, i.e., 90 days within the filing of the reply brief on appeal, Clark was not the law. Hayes' reply brief was filed June 3, 1986. He filed his first state habeas petition that same year. When Hayes filed his first habeas petition, he did so at a time when state law allowed consideration of subsequent petitions for various reasons or no reason at all.

Thus, because the denial of Hayes' claims as "untimely"

involves the retroactive application of a new rule, and Clark was not "firmly established" at the time Hayes should have raised these claims under that decision, the order cannot stand as an adequate and independent state ground under Ford v. Georgia, 498 U.S. 411 (1991) to bar federal review of Hayes' claims.

B. California's "Dixon" Waiver Rule.

The State contends that the Court of Appeals' order presents a further issue of "national importance" in that it does not preclude Hayes from pursuing three claims which were denied by the California Supreme Court as a result of his failure to raise the claims on appeal - the "Dixon"[12] rule violation. Although purportedly a matter of national importance, the State did not even challenge the magistrate judge's findings and recommendations with respect to this issue to the district court judge. Nevertheless, the issue now is raised here.

Citing Dixon in denying these three claims, the state court relied upon a rule that also has not been regularly or consistently applied. Like its pronouncement in Clark with respect to timeliness, "[t]he California Supreme Court recently

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[12] In re Dixon, 264 P.2d 513 (Cal. Sup. Ct. 1953).

held that it would construe and apply the Dixon rule more stringently and consistently in the future, virtually admitting that past precedent had been to the contrary." Odle v. Calderon, 884 F. Supp. 1404, 1413 (N.D. Cal. 1995)(citing In re Harris, 855 P.2d 391 (Cal. Sup. Ct. 1993)). "The court's plan to apply Dixon more strictly as of 1993 cannot pose an effective procedural bar to issues raised in [Hayes'] habeas petition (decided [June 1, 1995]) that were not raised on direct appeal (decided in [1990])." Id. (citing Ford, 498 U.S. at 424-25).

Thus, because the denial of these three claims involves the retroactive application of a new rule; to wit, the pronouncement in In re Harris, 855 P.2d 391 (1993) of the future regular application of Dixon, Dixon was not "firmly established" at the time Hayes should have raised these claims, and the order cannot stand as an adequate and independent state ground under Ford v. Georgia, 498 U.S. 411 (1991) to bar federal review of these claims.

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CONCLUSION

For the foregoing reasons, real party in interest Blufford Hayes Jr. respectfully requests that this Petition for Writ of Certiorari be denied.

Dated: May 30, 1997

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and not a party to this action; my business address is 1900 Avenue of the Stars, Suite 650, Los Angeles, California 90067.

On May 30, 1997, I served the foregoing document described as REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in a sealed envelope addressed as follows:

William G. Prahl, Esq.
Deputy Attorney General
Office of the Attorney General
1300 I Street, Ste. 125
P.O. Box 944255
Sacramento, California 94244-2550

[X] (By Mail): I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

[ ] (By Mail): As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after deposit for mailing in affidavit.

[ ] (By Personal Service) I caused such envelope to be delivered by hand to the offices of the addressee above.

[ ] (State): I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (Federal): I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on May 30, 1997, at Los Angeles, California.

Cynthia Kelley

CYNTHIA KELLEY

Supreme Court, U.S.
[redacted]
JUN. 18
[redacted]
CLERK

No. 96-1755

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

Arthur Calderon, Petitioner

v.

United States District Court,

Eastern District of California, Respondent

Blufford Hayes Jr., Real Party in Interest

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS FOR THE NINTH CIRCUIT

REAL PARTY IN INTEREST'S OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; SUPPLEMENTAL BRIEF IN OPPOSITION

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OPPOSITION TO MOTION TO FILE A BRIEF *AMICUS CURIAE*

COMES NOW real party in interest, Blufford Hayes Jr. (hereinafter "Hayes"), by and through his counsel of record, David A. Senior, and hereby opposes the motion of the Criminal Justice Legal Foundation for leave to file a brief *amicus curiae*. The request to appear *amicus curiae* should be denied because its brief: is devoted almost entirely to issues not presented by this case; is a rehash of its support of the petition for writ of certiorari that was denied by the Court in Morales v. Calderon, 85 F.3d 1387 (9th Cir.), cert. denied, __ U.S. __, 117 S. Ct. 500 (1996); and obfuscates the issues which properly are before the Court.

In the alternative, Hayes submits this supplemental brief in opposition to address the new issues argued for the first time in the brief *amicus curiae*. See Rule 15.7.

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I

THERE ARE NO ISSUES OF IMPORTANT FEDERAL LAW

THAT NEED TO BE DECIDED BY THIS COURT

Amicus curiae's brief is devoted entirely to California's habeas corpus timeliness rules.[1] While *amicus curiae*'s pride in the state's timeliness rules is well noted, as is its interest to allow California state courts the right to create, apply, modify, and define the rules over time, *amicus curiae* advocates the state's ability to thwart federal review with a state procedural rule that neither is firmly established nor regularly followed. Comity does not permit a state to trample federal constitutional rights in exchange for the promotion of *amicus curiae*'s parochial interests. Ford v. Georgia, 498 U.S. 411 (1991) ("[O]nly a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." Id. at 424 (quoting James v. Kentucky,

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[1] Petitioner also seeks review of the Court of Appeals' denial of mandamus relief regarding the adequacy of California's procedural rule requiring the presentation of claims during direct appeal ("Dixon rule"). In re Dixon, 264 P.2d 513 (Cal. Sup. Ct. 1953).

466 U.S. 341, 348 (1984))).[2]

It is the lack of regular application of California's June 6, 1989 timeliness standards that has caused courts, including the court below, to uniformly conclude that California's timeliness rules are not firmly established and regularly followed rules. Calderon v. United States Dist. Court E. Dist. Cal., 96 F.3d 1126 (9th Cir. 1996), cert. denied, __ U.S. __, 137 L. Ed. 2d 714 (1997); Morales v. Calderon, 85 F.3d 1387 (9th Cir.), cert. denied, __ U.S. __, 117 S. Ct. 500 (1996); Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1175 (1995); Karis v. Vasquez, 828 F. Supp. 1449 (E.D. Cal. 1993); Coleman v. Calderon, No. C 89-1906 RMW (N.D. Cal. Feb. 20, 1996) (unpublished memorandum); Allen v. Calderon, No. CIV-S-88-1123 DFL-JFM-P (E.D. Cal. Sept. 30, 1994) (unpublished memorandum); Kimble v. Vasquez, No. C 90-4826 SVW (C.D. Cal. Aug. 28, 1993) (unpublished memorandum); McDowell v. Vasquez, No. 90-4009 MRP (C.D. Cal. Apr. 8, 1993)

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[2] *Amicus curiae* argues that because a state rule is created on a particular date, it is "firmly established". Conspicuously absent from this analysis is the requirement that the state procedural rule must be "firmly established **and regularly followed**". In this regard, the rule must be more than simply created, it must provide a habeas petitioner with notice and the ability to understand the rule and its potential consequences.

(unpublished memorandum); Murtishaw v. Vasquez, No. C-F-91-508 OWW P (E.D. Cal. Feb. 19, 1993) (unpublished memorandum).[3]

While *amicus curiae* contends that the Court of Appeals' opinion in this case is one of a few recent bad apples that will soon spoil the barrel, every California district court dating back to 1993 has reached the same conclusion; to wit, the California timeliness policy neither is firmly established nor regularly applied to be adequate and independent to bar federal review.

A. Timeliness Standards After 1989 but Before Clark.

An examination of California's pre-Clark[4] timeliness rule, relied upon by *amicus curiae* throughout its brief, explains the consistency of the above federal court decisions. A watershed event of sorts occurred in California habeas corpus

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[3] *Amicus curiae* hyperbolically exclaims that the Court of Appeals has disregarded all of California's procedural default rules decided prior to 1993. Brief at 3-4. While the Court of Appeals' decisions with respect to inadequacy have been consistent, the lower court only has found **one** procedural rule inadequate; to wit, California's habeas timeliness rule in effect between June 6, 1989 and July, 1993. It should be noted that *amicus curiae* later downgrades its opening bluster at footnote four of its brief.

[4] In re Clark, 855 P.2d 729 (Cal. Sup. Ct. 1993).

jurisprudence on June 6, 1989. This event occurred not in the form of a statute, opinion, or rule, but rather in the form of a News Release by the Administrative Office of the Courts. This release, entitled "Supreme Court Adopts Policies Regarding Cases Arising From Judgments of Death," announced that the California Supreme Court, in an unprecedented action, was that day adopting a set of "policies" for capital appeals. Included among these "policies" was a set of Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and for Compensation of Counsel in Connection With Those Petitions ("Standards"). Included in those policies were requirements pertaining to timeliness. Significantly, they were termed "timeliness standards" rather than timeliness rules. Indeed, these standards were no more precise than prior timeliness rules cited by the state courts in providing guidance to habeas petitioners.

The clear excess of the court's rule-making authority notwithstanding,[5] the Standards purported to convert California

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[5] The California legislature has granted exclusive legislative authority to prescribe rules for practice and procedure in the California courts to the Judicial Council. People v. Wright, 639 P.2d 267, 270 (Cal. Sup. Ct. 1982); Cal. Penal Code § 1247k (West 1982). "[T]he only body outside the Legislature accorded an approximation of such quasi-legislative

overnight from a "post-affirmance" habeas jurisdiction to a "unitary" habeas jurisdiction, wherein habeas corpus proceedings are litigated in conjunction with direct appeal. Without prior notice or conducting rule-making proceedings, the court imposed upon "[a]ppellate counsel in capital cases . . . a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus." Standard 1-1.

A major component of the new system involved the purported clarification of an issue left unresolved by decades of decisional law: what the time limits are, if any, for filing a petition for writ of habeas corpus in state court. Unfortunately, the answer the Standards provided failed to

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rule-making competence is the Judicial Council, created by article VI, section 6, of the California Constitution and empowered thereby, inter alia, to 'adopt rules for court administration, practice and procedure, not inconsistent with statute.'" Reynolds v. Superior Court, 528 P.2d 45, 55 n.23 (Cal. Sup. Ct. 1974).

There is no evidence or authority that the Judicial Council has prescribed the timeliness rules referred to by *amicus curiae*. Instead, it is clear that these rules and/or policies were promulgated by the California Supreme Court. Therefore, these "rules" simply are the result of an impermissible exercise of judicial authority, and in reality, are not in fact state law.

The state court must actually have a clearly applicable state procedural rule upon which its default is premised. Ulster County Court v. Allen, 442 U.S. 140, 150 (1979). Absent the existence of such a rule, as in this case, the state court's order is inadequate to bar federal review. Id.

illuminate.

Eschewing all objective criteria, the Standards simply provided that habeas corpus claims must be investigated and presented "without substantial delay." Standard 1-1. In their original form, the Standards also provided that petitions filed within 60 days of the appellate reply brief presumptively are without substantial delay.[6] Standard 1-1.1. "Substantial delay" was to be gauged with respect to the date upon which "petitioner or counsel became aware of information indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis of the claim." Standard 1-1.2.[7] The absence of "substantial delay" was equated with a "reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim . . . ." Standard 1-1.2. Finally, the court rather enigmatically announced that any petitions filed thereafter "may be" denied as untimely. Standard 1-1.3.

The presumption that petitions filed within 60/90 days

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[6] A September 1990 amendment increased this period to 90 days. The court never has explained the reason for this increase.

[7] In 1993, this factual notice provision was changed to "knew, or should have known." See In re Clark, 855 P.2d 729 (Cal. Sup. Ct. 1993) (Appendix to Opinion).

after the final due date for the filing of appellant's reply brief are timely was meaningless in a great number of cases, including Hayes', because the 60/90-day period had passed prior to the Standards being issued. Petitioners in this situation, according to the Standards, could still establish an absence of substantial delay in two ways. First, they could provide specific facts showing the petition "was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis for the claim." Standard 1-1.2. Second, petitioners could allege specific facts "showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 . . . the petition was filed within a reasonable time after that date." Standard 1-1.3.

For petitioners unable to demonstrate lack of substantial delay in either of these two ways, the court required petitioners to demonstrate "good cause by showing particular circumstances sufficient to justify substantial delay." Standard 1-2. Failing that, the court warned, petitions "may be denied as untimely." Standard 1-3.

In sum, then, the 1989 Standards: (1) established a

time period of presumptive timeliness; (2) offered two ways in which petitions filed after that time period still could be timely; (3) stipulated a good cause requirement for untimely petitions; and (4) gave the court discretion to deny untimely petitions lacking good cause.

In July 1993, after four years of experience failed to endow any articulable timeliness criteria on the standards, the California Supreme Court conceded their vague and arbitrary application. In re Clark, 855 P.2d 729 (Cal. Sup. Ct. 1993). The Clark court's review of the "law governing collateral attacks on judgments of conviction by petition for writ of habeas corpus" led the court to the following conclusion: "no clear guidelines have emerged in our past cases." Id. at 737 (emphasis added). The state court announced substantial revisions to the Standards in July 1993, reprinted as an appendix to the Clark opinion.

While the policies provided no basis for uniformity in application, they did provide the predicate for subsequent uniformity of the federal courts' opinions and orders, as well as an admission by the California Supreme Court, that the 1989 Standards' timeliness rules were not firmly established and

regularly followed.[8]

In summary, the 1989 timeliness Standards acquired the characteristics of a "know it when you see it" policy, which California certainly is entitled to have and use as its state courts see fit; however, the lack of consistent application renders it inadequate to bar federal review.

II

THERE ARE NO CONFLICTS IN THE COURTS BELOW

Amicus curiae argues that certiorari should be granted to resolve a purported inter-circuit conflict that there is uncertainty with respect to whether an adequate state procedural rule requires that it must be regularly followed in habeas cases. Petitioner unsuccessfully proffered this argument to this Court

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[8] *Amicus curiae* argues that the Court of Appeals "has failed to consider the unique nature of timeliness rules . . . ." Brief at 5. In fact, not only has the Court of Appeals noted the uniqueness of the rule, so too has the California Supreme Court in concluding that the rules have established no clear guidelines. In re Clark, 855 P.2d 729, 737 (Cal. Sup. Ct. 1993). *Amicus curiae* proffers that a timeliness rule serves a purpose similar to a statute of limitations - to guard against the presentation of stale claims; yet it fails to acknowledge that the uniqueness of California's timeliness rule provides that it "cannot fairly be analogized to a statute of limitations". Id. at 759 n.30.

in Morales v. Calderon, 85 F.3d 1387 (9th Cir.), cert. denied, __ U.S. __, 117 S. Ct. 500 (1996). Now *amicus curiae* is playing this tune, but never actually identifies the conflict.

Amicus curiae correctly notes that this Court already has held, in a habeas corpus case, that an adequate state rule used to bar federal review must be consistently or regularly applied. Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989). The Court's application of the "consistently applied" and "regularly followed" standard in Dugger has created a uniform application of this adequacy test by all lower courts. In this regard, and consistent with the Court of Appeals' decision in this case, every federal circuit has stated in a habeas corpus proceeding that only those state rules that are consistently enforced are adequate to support a finding of procedural default.[9] No circuit ever has rejected consistency of application as a test of adequacy.

In this regard, no issue set forth in the petition remains unanswered by the Court, and no confusion has occurred with respect to the lower courts' understanding and application of this adequacy test.

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[9] Hayes cited these cases at page 10 of his opposition to the petition for writ of certiorari.

Amicus curiae argues that the instant case is distinguished from Prihoda v. McCaughtry, 910 F.2d 1379 (7th Cir. 1990) by its alleged contrary result. *Amicus curiae* is, quite simply, wrong. Prihoda involved a very different set of legal and factual issues, ones not present in this case.

The issue in Prihoda was whether the mere existence of a "good cause" exception to a clear state procedural requirement automatically violated the "strict adherence" formulation of the adequate and independent state ground doctrine articulated by Barr v. Columbia, 378 U.S. 146 (1964). The petitioner in Prihoda had violated the straightforward state-law procedural requirement, contained in Wisconsin Statute section 974.06(4), that "all grounds for relief available to a prisoner . . . must be raised in his original, supplemental or amended motion [for collateral relief]." Prihoda v. McCaughtry, 910 F.2d at 1381. The petitioner's second motion for collateral relief was denied on procedural grounds, notwithstanding petitioner's contention that his pro se status during the prior proceeding constituted "good cause" for a successive motion for collateral relief.

In the Seventh Circuit, the petitioner relied on Barr v. Columbia, 378 U.S. 146 (1964) to argue that the existence of a "good cause" exception to the rule rendered its enforcement

insufficiently "strict" to constitute an adequate and independent state ground for decision. In the alternative, petitioner set forth a single example from ten years earlier, State v. Willis, 69 Wis. 2d 489, 230 N.W.2d 827 (1975)(a second motion for collateral relief was entertained partially because the first motion had been filed pro se), to attempt to demonstrate that the state court had failed to administer the exception evenhandedly.

Despite *amicus curiae*'s emphatic assertions, there is no disagreement between the Ninth and Seventh Circuits. The Seventh Circuit's general view of the adequate and independent state ground doctrine, as expressed in Prihoda, is entirely consistent with the Ninth Circuit's:

> A state ground is "adequate" only if the state court acts in a consistent and principled way. A basis of decision applied infrequently, unexpectedly, or freakishly may be inadequate, for the lack of notice and consistency may show that the state is discriminating against the federal rights asserted.

Prihoda, 910 F.2d at 1383 (citing Johnson v. Mississippi, 486 U.S. 578 (1988); Barr v. Columbia, 378 U.S. 146 (1964); Howlett v. Rose, 496 U.S. 356 (1990)). Furthermore, there is nothing in the instant case, or other Ninth Circuit cases, that suggests the slightest disagreement with Prihoda's view that "[a] rule of forfeiture-unless-good-reasons may be 'strictly' followed when the state is scrupulous about treating particular reasons as 'sufficient' routinely and others as insufficient with equal regularity." Id. at 1384.

Hayes demonstrated in the district court (as well as in his Brief in Opposition filed in this Court) that the routine practice of the California Supreme Court was to treat all petitions involving the circumstances of the instant case as timely filed. Unlike the Prihoda petitioner's reliance on a single deviation from the state-court rule (based only in part on his own similar circumstances), Hayes' showing is supported by an examination of California Supreme Court rulings in every state court petition filed under similar circumstances. That showing led below to the inescapable conclusion that the state court's application of the timeliness guidelines was entirely without rhyme or reason.

Consequently, leave to file the brief *amicus curiae*

should be denied. In the alternative, the Court should reject the arguments of *amicus curiae* by denying the petition for writ for certiorari.

CONCLUSION

For the foregoing reasons, real party in interest Blufford Hayes Jr. respectfully submits that the motion of the Criminal Justice Legal Foundation for leave to appear *amicus curiae* be denied, or in the alternative, that its arguments should be rejected with a denial of the petition for writ of certiorari.

DATED: June 17, 1997

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and not a party to this action; my business address is 1801 Century Park East, 26th Floor, Los Angeles, California 90067.

On June 17, 1997, I served the foregoing document (s) described as REAL PARTY IN INTEREST'S OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; SUPPLEMENTAL BRIEF IN OPPOSITION on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in a sealed envelope addressed as follows:

William G. Prahl, Esq.
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Office of the Attorney General
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Kent Schiedegger
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2131 L Street
Sacramento, CA 95816

[X] (By Mail): I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

[ ] (By Mail): As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California n the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more that one day after deposit for mailing in affidavit.

[ ] (By Personal Service) I caused such envelope to be delivered by hand to the offices of the addressee above.

[ ] (State): I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (Federal): I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on June 17, 1997, at Los Angeles, California.

Michelle Raluy

MICHELLE RALUY